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—— —— s. 266. *In re* Destone Fabrics, Ld. **Simonds J., C. A. 319**

—— —— s. 294, sub-s. 1. *In re* Scad, Ld. **Uthwatt J. 386**

—— —— s. 370, sub-s. 1. Benabo *v.* William Jay & Partners, Ld. **Morton J. 52**

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19 & 20 Geo. 5, c. xvii. (*Doncaster Area Drainage*), s. 12, sub-ss. 1, 3; s. 33. Dalton Main Collieries, Ld. *v.* Rossington Main Colliery Co., Ld., and Another **Farwell J., C. A. 268**

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1 & 2 Geo. 6, c. 28 (*Evidence*), s. 1, sub-s. 3. Plomien Fuel Economiser Co., Ld. *v.* National Marketing Co. **Morton J. 248**

1 & 2 Geo. 6, c. 45 (*Inheritance* (*Family Provision*)), s. 1. *In re* Sylvester. Sylvester *v.* Public Trustee **Farwell J. 87**

In re Joslin. Joslin *v.* Murch **Farwell J. 200**

Mastaka *v.* Midland Bank Executor and Trustee Co., Ld. **Farwell J. 192**

—— —— s. 1, sub-s. 2 (*b*). Pointer, *In re.* Pointer & Shonfeld *v.* Edwards and Others **Morton J. 60**

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2 & 3 Geo. 6, c. 62 (*Emergency Powers* (*Defence*)), s. 1, sub-s. 2 (*b*). John Fowler & Co. (Leeds), Ld. *v.* Duncan - - **Farwell J. 450**

2 & 3 Geo. 6, c. 67 (*Courts* (*Emergency Powers*)), s. 1. *In re* Bikker's Application - **Morton J. 165**

—— —— s. 1, sub-s. 1. Galbraith *v.* McKenna - - **Simonds J. 137**

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—— —— s. 1, sub-s. 2. *In re* Hutley's Legal Charge - **Morton J. 369**

O'Hara *v.* Lipman **Morton J. 57**

—— —— s. 1, sub-s. 2 (*a*) ii.). *In re* Wood's Application **Morton J. 112**

In re Belbridge Property Trust, Ld - - - **Uthwatt J. 304**

2 & 3 Geo. 6, c. 67 (*Courts* (*Emergency Powers*)), s. 1, sub-ss. 2 (*a*) (ii.), (iv.), 4. *In re* Application by Midland Bank - **Morton J. 350**

—— —— s. 1, sub-s. 2 (*a*) (iv.). John Barker & Co., Ld. *v.* Littman **C. A. 405**

—— —— s. 1, sub-s. 4. *In re* Chalfont and District Permanent Building Society's Application **Morton J. 458**

National Provincial Bank, Ld. *v.* Liddiard - **Farwell J. 158**

2 & 3 Geo. 6, c. 75 (*Compensation* (*Defence*)), s. 2, sub-s. 1 (*a*). *In re* Hutley's Legal Charge - **Morton J. 369**

2 & 3 Geo. 6, c. 89 (*Trading with the Enemy*), s. 4, sub-s. 1. *In re* I.G. Farbenindustrie Aktiengesellschaft's Agreement **Morton J. 147**

2 & 3 Geo. 6, c. 107 (*Patents, Designs, Copyright and Trade Marks* (*Emergency*)), s. 2, sub-s. 1. *In re* I.G. Farbenindustrie Aktiengesellschaft's Agreement **Morton J. 147**

2 & 3 Geo. 6, c. 108 (*Possession of Mortgaged Land* (*Emergency Provisions*)), s. 1, sub-s. 1. *In re* Hutley's Legal Charge - - **Morton J. 369**

Army Act, s. 113, sub-s. 4; s. 115. Roadways Transport Development, Ld. *v.* Attorney-General **Farwell J. 392**

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re SYKES.

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Will—Construction—Option to purchase shares in private company—Assignment by donee—Subsequent death of donee without exercising option—Whether exercisable by assignees or executors of donee—No presumption against transmissibility.

There is no rule of law that an option given by will to a named person is prima facie personal to the donee only, and the statement to that effect in Jarman on Wills, 7th ed., at p. 73, cannot be supported.

The question whether such an option of purchase is exercisable only by the donee personally, or is transmissible to his executors or assignees is one which depends entirely on the true construction of the will.

The Court (Scott and Clauson L.JJ., Luxmoore L.J. dissenting) held that on the true construction of a testator's will an option to purchase shares belonging to his estate at par value was personal to the donee, and could not be assigned by him or be exercised by his executors after his death.

Per Luxmoore L.J. There being nothing to be found in the will to forbid assignment, the option was assignable.

Dicta of Cotton and Lindley L.JJ. in *In re Cousins* (1885) 30 Ch. D. 203, at pp. 213, 215, explained, and the decision distinguished.

Decision of Bennett J. [1940] Ch. 490 affirmed on different grounds.

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APPEAL from a decision of Bennett J. (1)

The plaintiff, one of the trustees of the will, dated February 15, 1911, of William Shaw Sykes, took out a summons for the determination of the question whether an option of purchase given by his will to his son was exercisable by the donee only, or after his death without having exercised it by assignees of it during his life or his personal representatives. The will provided, as regards the option, as follows: " Whereas " part of my estate consists of the shares in the English Card " Clothing Company, now standing in the name of my son " Edward Musgrave Sykes, as registered owner, and I am " desirous that my said son shall have the opportunity of " becoming absolute owner of the same shares, now I hereby " declare and direct that upon the decease of my said wife " or previously thereto in case or whenever my trustees shall " proceed to realise the part of my estate consisting of or " including such shares and my beneficial right thereto and " ownership thereof, my son Edward Musgrave Sykes shall " have the option of purchasing and becoming absolute owner " of the said shares or any part thereof, and all my estate " interest right and title therein and thereto, the value of " such shares for the above purpose to be estimated at par " value."

The testator died on September 9, 1916, at which date Edward Musgrave Sykes was the registered holder of 300 shares of 10*l.* each in the company, afterwards converted into 3000 shares of 1*l.* each. In 1918 as a result of capitalizing profits the company issued to the holder a block of 1500 bonus shares of 1*l.* each. By a deed dated July 26, 1932, E. M. Sykes assigned the benefit of the option to trustees. On May 18, 1939, the testator's widow died, and on June 29, 1939, E. M. Sykes died without having exercised the option. On November 29, 1939, his executors purported, by notice in writing, to exercise it, and on February 14, 1940, the trustees of the deed of July 26, 1932, on the footing that they were assignees of the option, purported also to exercise it by notice in writing.

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(1) [1940] Ch. 490.

The summons was taken out by Arnold Chadwick Younghouse, one of the trustees of the testator's will, asking whether on the true construction of the will the option ceased to be exercisable on the death of E. M. Sykes or was validly exercised by the notice of November 29, 1939, or alternatively by that of February 14, 1940.

The defendants to the summons were Leonard Musgrave Sykes, the other trustee of the testator's will, Alan John Skelton and Joe William Dyson, the executors of E. M. Sykes, and Norman Hugh Mathews who, with A. J. Skelton, was a trustee of the deed of 1932.

Bennett J. held that on the true construction of the will the option of purchase was intended by the testator to be exercisable only by the son during his lifetime, and ceased to be exercisable on his death. But he decided the case mainly on the ground that he was bound by authority so to hold, namely, the decision in *In re Cousins* (1), and a statement in Jarman on Wills, 7th ed., vol. 1., at p. 73, as follows: "An "option of purchase given by will to A. B. is prima facie personal "to him and does not pass to his executors on his death." He also relied on the Irish decision of *Belshaw* v. *Rollins*. (2)

The executors of Edward Musgrave Sykes, and the other trustee of the deed of 1932, appealed. The appeal was heard on July 25 and 26 and judgment, having been reserved, was delivered on September 19.

Wilfrid M. Hunt and *L. M. Jopling* for the appellants. This is a benefit given by will to E. M. Sykes and there is no reason why it should not be transmissible in the same way as any other benefit. Any such benefit is prima facie assignable unless there is a provision in the will to the contrary, and on the true construction of this will, there is no such prohibition: see *Wright* v. *Morgan* (3); *Belshaw* v. *Rollins* (2); *Buckland* v. *Papillon* (4); *Tolhurst* v. *Associated Portland Cement Manufacturers* (5); *Taylor* v. *Cooper*. (6)

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(1) (1885) 30 Ch. D. 203.
(2) [1904] 1 I. R. 284.
(3) [1926] A. C. 788.
(4) (1866) L. R. 2 Ch. 67.
(5) [1903] A. C. 414, 423.
(6) (1846) 10 Jur. 1078.

The statement in Jarman on Wills on which the learned judge relied is not supported by any authority and *In re Cousins* (1) did not decide any question of principle, and turned entirely on the construction of the particular will. The facts in that case were also different, the option there was to purchase the goodwill of a hotel business, in which personality is of great importance.

H. B. Vaisey K.C. and *D. W. Markwick* for the respondents. The decision of the learned judge was right on both grounds. Apart from construction the statement in Jarman on Wills, 7th ed., at p. 73, that an option of purchase given by will to A. B. is prima facie personal to him, is perfectly accurate, and is based on a dictum of Lord Eldon in *Earl of Radnor* v. *Shafto.* (2) But if, on the other hand, the presumption is that an option given by will is transmissible, then the language of this will is sufficient to rebut it and to show an intention to the contrary: see *Arthur* v. *Mackinnon* (3); *In re Lord Wavertree* (4); *In re Madge.* (5) Having regard to the words used in the will, the position of the direction, and all the circumstances, we submit that the option was at an end when E. M. Sykes died without exercising it. It had to be exercised upon the death of the widow or within a reasonable time afterwards: *In re Wilson.* (6)

Wilfrid M. Hunt in reply. This is not merely a direction to the trustees, but the gift of an option to the son, and it extended to the 1500 bonus shares issued by the company. Any option whether created by deed or will is an interest in property and is prima facie assignable.

Cur. adv. vult.

1940. Sept. 19. CLAUSON L.J. In the unavoidable absence of Scott L.J., I proceed to read the judgment of Scott L.J. and myself.

William Shaw Sykes made his will on February 15, 1911, and thereby gave all his real and personal estate to his wife

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(1) 30 Ch. D. 203.

(2) (1805) 11 Ves. 448.

(3) (1879) 11 Ch. D. 385.

(4) [1933] Ch. 837.

(5) [1928] W. N. 71; 44 Times L. R. 372.

(6) [1908] 1 Ch. 839.

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Clara and his sons Edward and Leonard upon trust for sale and conversion with the fullest discretion to postpone the sale and conversion, and upon trust to invest the ultimate proceeds of conversion, and to pay the income of the trust moneys and investments to his wife Clara for her life: and he declared that after her death his trustees should stand possessed of the trust premises upon trust for his sons Edward and Leonard in equal shares. Both Edward and Leonard survived the life tenant, and it is unnecessary to state the provisions made for the event of either predeceasing the life tenant. The will continued as follows: "And Whereas part of my "estate consists of the shares in the English Card Clothing "Company, Limited, now standing in the name of my son "Edward Musgrave Sykes as registered owner and I am "desirous that my said son shall have the opportunity of "becoming absolute owner of the same shares Now I hereby "declare and direct that upon the decease of my said wife "or previously thereto in case or whenever my trustees shall "proceed to realize the part of my estate consisting of or "including such shares and my beneficial right thereto and "ownership thereof my son Edward Musgrave Sykes shall "have the option of purchasing and becoming absolute owner "of the said shares or any part thereof and all my estate "interest right and title therein and thereto the value of such "shares for the above purpose to be estimated at par value."

It appears from the memorandum of association and the articles, copies of which were furnished to this Court, that the company had been formed in 1897 to amalgamate four card clothing concerns, one of which belonged to the Sykes family. In the year 1916, at meetings at which a member of the Sykes family presided, new articles were adopted, the company having by that time become a private company in the strict technical sense, with restrictions on transfer of the usual character, giving the directors a right to require any intending transferor of shares to offer the shares to them at the market price, to be fixed annually by the auditors.

The testator died on September 9, 1916, and the widow and the son Edward shortly afterwards proved the will.

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Three hundred shares of 10*l.* each in the English Card Clothing Company, Ld., which belonged to the testator were registered at the time of his death in the name of the son Edward. The 300 shares were subsequently subdivided into 3000 shares of 1*l.* each. In the year 1918, 1500 bonus ordinary shares of 1*l.* each were issued to Edward as the holder of the 3000 shares.

The trustees did not realize the shares during the widow's lifetime. She died on May 18, 1939, and there is no doubt that, upon the terms of the will, Edward thereupon became entitled to purchase the 3000 shares at par, and thus make himself complete beneficial owner of the shares. He did not exercise the option, but died on June 29, 1939. There are, however, two parties before the Court claiming the right now to become owner of the 3000 shares and also of the 1500 bonus shares on paying par. Those parties are, first, the executors of Edward and, secondly, certain trustees claiming under a deed of July 26, 1932. By this deed Edward had covenanted with his former wife and the trustees to pay an annuity to his former wife and had purported to assign to the trustees, by way of security, his interest under the testator's will in the 4500 shares with the full benefit of, and the right to exercise the option given to him of purchasing and becoming owner of those shares at the par value thereof. Both sets of claimants have given notice to the present trustees of the testator's will purporting to exercise the option. It is common ground that the shares are worth about two and a quarter times the par value.

As between the two sets of claimants to exercise the option no real question arises. If the executors can now exercise the option they are obviously bound, by reason of their testator's deed, to give the trustees of that deed the benefit of the exercise.

As regards the ambit of the option, it was suggested (and obviously the deed of July 26, 1932, proceeded on that footing) that it covered not only the 3000 shares of 1*l.* each, which represented the 300 shares which belonged to the testator at the time of his death, but also the 1500 bonus

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shares. In the view which the learned judge took, namely, that the option was not exercisable by either set of claimants, it became unnecessary for him to deal with this question. In this Court, having regard to the decision of Wrottesley J. in the case of the *Attorney-General* v. *Oldham* (1), since affirmed in this Court (2), the point was not pressed, and it was, in effect, conceded that the ambit of the option must in any view be treated as confined to the 3000 shares.

The question, however, which remains for decision is whether, having regard to the terms of the will, either of the two parties who now claim to be entitled to the benefit of the option are properly so entitled. The learned judge took the view that he was bound by authority to hold that an option given by a will is prima facie personal to the party to whom it is given and that, as he could find in the will no language to indicate that the option given by the testator to Edward was to be exercised by any person other than Edward, he was bound by authority to hold that the option ceased to be exercisable on Edward's death. His Lordship, however, intimated, as we understand his language, that he was disposed to think that, on the true construction of the will, the testator was contemplating and intending that the option should be exercised by Edward only.

In our judgment, the problem is to be approached by considering, in the first place, what is the true intention and meaning of the testator as appearing from the language of the will. It appears to us to be clear that he does not contemplate Edward as having any right to purchase the shares until the death of the widow save in the event, which did not in fact happen, of the trustees proceeding to realize the shares. He did clearly contemplate that on her death Edward should have the right, if he thought proper to exercise it, of purchasing the shares; but he gives the right in terms to Edward, and to no one else. It would, of course, have been open to him to confer the option on Edward, his executors, administrators and assigns. It would also have been open to him to express his wishes in the form of a conditional

(1) [1940] 1 K. B. 599. (2) [1940] 2 K. B. 485.

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gift, and to say that on the widow's death, or on any other specified event, the shares should become Edward's property, subject to the condition of his paying the par value of them to the estate. He has not taken either of these courses, and we see no reason for departing from what appears to us to be the strict meaning of the words he uses, or to hold that the option is exercisable by any one but the person named, that is Edward, or at any time but the time indicated, that is to say, in the events which happened, at the widow's death or within a reasonable time thereafter.

We thus reach the same conclusion as the learned judge, but we are not in accord with his view that he was bound by authority. It is true that in the case of *In re Cousins* (1), Lindley L.J. indicates that it is important, in construing the words of the will, to ascertain whether they exhibit an intention on the testator's part that the executors, administrators or assigns of the person to whom the option is given are to be entitled to exercise the option ; but that case cannot, in our judgment, be treated as laying down any principle, unless it is that attention must be paid to the words of the will in ascertaining the testator's intentions as to the person, or persons, by whom the option is to be exercisable. Each case must, in our judgment, depend on the language used by the testator, and it may be well to be careful not to be led away from a consideration of the testator's language by studying the language used in other wills, or considering reported cases where similar language is used whether in testamentary or in contractual documents. Our attention was drawn to the case of *Wright* v. *Morgan* (2), where the Judicial Committee of the Privy Council had to construe a clause directing certain trustees to offer certain land at a valuation to a named person before selling it elsewhere. Their Lordships construed the clause as creating a vested interest in the named person, that is to say, as we understand, a vested interest in equity in the land, and pointed out that such an interest would be assignable. However, in the view their Lordships took of the case as a whole, the point became

(1) 30 Ch. D. 203.

(1) [1926] A. C. 788.

academic, since it was held that the person who claimed to be assignee of the option was in any event precluded in equity from becoming transferee of the property. We cannot deduce any guiding principle from this decision to assist us in construing the will of the present testator.

For these reasons, we agree in the result reached by the learned judge, and in our judgment the appeal should be dismissed.

In the Court below, the costs were ordered to be paid out of the estate, that is to say, out of the shares of Edward and Leonard in moieties, and to be taxed as between solicitor and client. In this Court, the costs of all parties of the appeal must be ordered to be paid out of Edward's moiety of the testator's estate, the costs of Mr. Younghouse, who is interested solely as a trustee of the will, being taxed as between solicitor and client.

As there is a difference of opinion in this Court, leave will, if asked for, be given to appeal to the House of Lords.

I now proceed, in the unavoidable absence of Luxmoore L.J., to read his judgment.

LUXMOORE L.J. The question to be determined on this appeal arises under the provisions of the will dated February 15, 1911, of William Shaw Sykes (hereinafter called "the testator") with regard to certain shares in the capital of the English Card Clothing Company, Ld. (hereinafter called "the company"). Three hundred of these shares, which were of the nominal value of 10*l.* per share, were at the date of the will and at the testator's death registered in the company's share register in the name of the testator's son Edward. Subsequent to the death of the testator, which happened on September 9, 1916, these 300 shares were subdivided and became 3000 shares of 1*l.* each. In the year 1918 the company issued, by way of bonus to Edward as the registered holder of the 3000 shares, a further block of 1500 fully paid shares of 1*l.* each. Subsequently, further shares were purchased by the testator's trustees, and these also were registered in Edward's

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name. It is not necessary to refer to either the 1500 bonus shares or the further shares purchased as aforesaid, because no question has been raised with regard to them in this appeal, the appellants admitting that they cannot make any claims to any of them.

Under the testator's will, all his real and personal estate was given to his trustees upon trust for sale, conversion and investment, with power to postpone sale and conversion at their discretion. The beneficial trusts were to pay the income of the trust estate to the testator's wife for her life, and after her death the trust estate was to be divided between his two sons, Edward and Leonard, in equal shares with certain gifts over in the event of either son predeceasing the testator's wife. It is not necessary to refer more particularly to the terms of the gifts over.

The testator's will contained directions with regard to his shares in the company, and it is under these directions that the question to be determined arises. The directions are introduced by a recital in these words. [His Lordship read the above direction and proceeded :] The testator's widow died on May 18, 1939, while his son Edward died on June 29 of the same year. There has been no dealing with the shares in question, except as above stated during the interval between the testator's death and the present time, except by a deed of security dated July 26, 1932, and made between the testator's son Edward of the first part, Alvina Sykes of the second part, and Norman Hugh Mathews and Alan John Skelton of the third part. Edward, as beneficial owner, assigned (among other things) to Norman Hugh Mathews and Alan John Skelton as the trustees thereof the full benefit of and the right to exercise the option given by the testator's will to Edward " of purchasing and becoming absolute owner "of the shares in the company comprised in the estate of the "testator at the par value thereof." The assignment referred to was made by way of security only. After the death of Edward, his executors, Alan John Skelton and Joe William Dyson, by notice in writing dated November 29, 1939, purported to exercise the option given to Edward by the will of the testator in respect of 4500 of the said shares, or such lesser number as might be the subject of the option; and later, by notice dated February 14, 1940, the said N. H. Mathews and A. J. Skelton as trustees of the deed of July 26, 1932, as assignees of the said option purported to exercise it in respect of the same shares. The shares in question have at all material times been of a value considerably in excess of the nominal value thereof. After the death of Edward, the value of the said shares was under the provisions of the company's articles of association fixed by the auditors of the company at 2*l.* 6*s.* $1\frac{2}{25}$*d.* per share.

On March 5, 1940, Arnold Chadwick Younghouse, as one of the trustees of the testator's will, issued an originating summons for the purpose of determining whether the option ceased to be exercisable by reason of the death of Edward without having given any notice during his lifetime of his desire to exercise it, or has been validly exercised by his executors or by the trustees of the deed of July 26, 1932. The originating summons was heard by Bennett J., who held that, in the events that happened, the option ceased to be exercisable on the death of Edward. He based his decision on a statement to be found in Jarman on Wills, 7th ed., vol. I., p. 73, that "an option of purchase given by will to A. B. "is prima facie personal to him and does not pass to his "executors on his death." The decision of the Court of Appeal in *In re Cousins* (1), is cited in support of the statement, and Bennett J. held that that decision did in fact support it. The executors of Edward and the trustees of the deed of July 26, 1932, have jointly appealed from the decision of Bennett J., and by their notice of appeal they ask for a declaration that upon the true construction of the will of the testator and in the events which have happened the said option did not cease to be exercisable on the death of Edward and was duly exercised either by the notice of November 29, 1939, by his executors, or by the notice of February 14, 1940, by the trustees of the deed of July 26, 1932. If the Court should hold that Bennett J. was in error in holding that

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(1) 30 Ch. D. 203.

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the option ceased to be exercisable, then the appellants admit that the option cannot affect any shares other than the 3000 shares representing the original 300 shares, and that they cannot contend that the 1500 bonus shares or the further shares purchased by the trustees are subject to it. Counsel for the appellants also stated that in the same event it would not be necessary to determine which of the two notices was effective to exercise the option.

The first question to be considered appears to be whether the statement of the law on which Bennett J. relied is correct. I have read the case of *In re Cousins* (1) with care, and I am unable to find that the Court laid down any such principle as the editor of the 7th edition of Jarman on Wills has purported to extract from it. Certainly, there is no express statement of any such principle to be found in the reports. As I read them, the judgment of each member of the Court is based upon the construction to be placed on the words of the particular will under consideration. Sir William Brett M.R., after stating and analysing the words of the will, comes to the conclusion that the option was "a mere personal option." Cotton L.J. says (2): "The only question which we have to consider "here is this, namely, whether the option which was given had "come to an end, that is to say, whether it is an option to be "exercised, ... not only by the son, but, after he was dead, "by his executors." He decides that the option was personal to the son by reason of the terms of the testator's will. Lindley L.J. comes to the same conclusion. He says (3): "Now there is not a word in the will which I have "read, to show that the testator intended that the son's "executors, administrators, or assigns should exercise that "option." He then deals with the actual language of the will before the Court, and of a codicil to it, and holds that the option is a personal one under the will, and that the codicil did not make it anything else. I find that no other text-book supports the view that *In re Cousins*(1) lays down any such principle as that to which I have already referred. In Theobald on Wills, 9th ed., p. 189, it is stated: "Testators

(1) 30 Ch. D. 203. (2) Ibid. 213. (3) Ibid. 215.

"sometimes give options of purchasing a part of their property. "Such an option may be personal to the beneficiary or it may "be transmissible." For this statement, the authority quoted is *In re Cousins.* (1) In my opinion, the statement in Theobald is in accordance with and is supported by the decision in *In re Cousins* (1), while that in Jarman is not so supported. In vol. 34 of the Hailsham edition of Halsbury's Laws of England, at p. 34 it is stated "One form of conditional gift "is an option to purchase or other gift conditional on some "consideration being given. A mere option to purchase given "to a named donee may be personal to the donee and not "transmissible." The authorities stated for the last statement include *In re Cousins.* (1) The statement continues "on the "other hand, a gift for a named consideration is prima facie "construed as transmissible to the donees representatives "and assigns."

In my judgment, the question whether an option given by will is personal only or is transmissible must in every case depend on the language of the particular will. It seems to me that one important matter to be considered, in arriving at a conclusion on this point, must be whether the option is a beneficial one, in the sense that it confers on the donee the right to acquire some item of property at a price considerably below its market value. For instance, in the case now under consideration the shares in question were, I understand, at all material times, including the date of the will, of a value considerably in excess of their nominal value. So that the testator knew and intended that if the option should be exercised it would result in his son Edward acquiring for himself and as part of his estate the difference between the actual value of the shares and the nominal value thereof; that is to say, if the actual value was 2*l.* 6*s.* per share, the difference in favour of Edward would be no less than 3900*l.* It would certainly seem to be capricious to confer a benefit to this extent on Edward only in the event of his surviving the testator's widow and exercising the option, and not to do so if, although he survived the widow, he happened to die before

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he had in fact exercised it. Further, it is, I think, proper to consider the precise nature of the option conferred. Edward was in fact the legal owner of the shares at the date of the will, and the testator plainly contemplated that he would continue to remain the legal owner during the life of the testator's widow, and afterwards until the shares should be sold. The right he was giving to Edward was as stated in the recital already quoted "the opportunity of becoming "absolute owner of the shares"; in other words, Edward was to be allowed to keep the shares already in his name provided he paid to the testator's executors the par value thereof. When the option is examined in the light of the actual facts, the direction in the will appears, in effect, to be the same as a direction that Edward shall be entitled to keep the shares in question if a payment of a sum equal to the nominal value of the shares is paid to the testator's executors. It seems to me that there is less foundation for holding that an option is personal to the donee where the result of its exercise confers a large pecuniary benefit than where the option is to buy at a valuation. For, in the former case, it would seem to be the intention of the testator to confer on the donee of the option a benefit translatable into terms of pounds, shillings and pence. Our attention was called to the case of *Wright* v. *Morgan* (1), a decision of the Privy Council in an appeal from the Court of Appeal of New Zealand. In that case a testator, who owned estates at Ashburton in New Zealand, provided by his will that such estates should be offered to his son Harry at a valuation. Harry, after the testator's death, sold the benefit of this option to his brother Douglas. Douglas purported to exercise the option, and questions arose with regard to the validity of the purchase of these estates by Douglas, the first question being whether the option was assignable or was personal to the son Harry. The material words of the testator's will were "my said "trustees shall not sell my freehold estate in the County of "Ashburton or any part thereof until the same shall have been "offered . . . . at a valuation . . . . nor until my son

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(1) [1926] A. C. 788.

"Harry shall have refused or omitted to notify in writing "[to the trustees] his acceptance of the offer within three "months after the making thereof." The trial judge held, among other things, that the option was assignable. The Court of Appeal of New Zealand held it was not assignable. When the case was before the Privy Council, Lord Dunedin said (1): "The leading question accordingly is whether the "option to purchase given by the will to Harry Herbert was "assignable and assigned to Douglas . . . . Speaking generally, "any vested interest is assignable unless there is something in "the nature of the interest, or something in the words of the "settlement which creates the interest which contradicts the "nature of assignability. Their Lordships do not doubt "that Harry Herbert's option might have been assigned to a "third person. There is nothing in the nature of the interest "itself which points to non-assignability, nor are there any "words in the will which would seem to forbid assignation." These words seem to me to lay down a general principle of construction, and are not confined to the particular question of what was the construction of the particular will. In the present case, the subject-matter of the option is the beneficial interest in shares in a limited liability company. There appears to be nothing in its nature to point to non-assignability, and I am quite unable to discover any words in the will which could properly be said to forbid assignation. The absence of any reference to the executors, administrators and assigns of Edward do not seem to me to be sufficient for such purpose. There is, moreover, in the present case, no direction to the testator's trustees to offer the shares to Edward before selling to anyone else. Instead of any such direction, the option is given direct to Edward, who is already the registered owner of the shares, the subject-matter of the option. All that has to be done if the option is exercised is to pay to the trustees of the testator's will 3000*l.*, and it seems to me that the personality of the payer cannot have been a matter of moment to the testator's mind when he made his will.

For the reasons I have endeavoured to state, I have come

(1) [1926] A. C. 788, 795.

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to a conclusion different from that of my brethren. I would allow the appeal, and discharge the order of Bennett J. so far as it declares that the option in question ceased to be exercisable on the death of Edward. In lieu thereof, I would declare that such option did not cease to be exercisable on the death of Edward by the persons claiming under him.

I would not interfere with the order as to costs made in the Court below, and I would make a similar order as to the costs of all parties to this appeal.

Appeal dismissed.
Leave given to appeal to the House of Lords.

Solicitors: *S. F. Miller, Mathews & Co., for Taylor, Kirkman & Mainprice, Manchester; Skelton & Co., Manchester.*

H. L. L.

In re OWERS.

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Oct. 21.

PUBLIC TRUSTEE *v.* DEATH.

[1940. O. 189.]

Will—Construction—Legacy payable out of residue—Mixed fund of real and personal estate—Estate duty attributable to real estate—Whether proportion to be borne by legacy.

A general direction to pay legacies out of a mixed fund or residue charges them rateably on the portion attributable to realty and personalty. So far as the legacies are payable out of the portion attributable to realty they must bear their own estate duty, notwithstanding a direction to pay "testamentary "expenses" out of the mixed fund.

In re Spencer Cooper. Poë v. *Spencer Cooper* [1908] 1 Ch. 130 approved.

Appeal from Morton J.

The testator, Ernest Owers, who died on November 20, 1938, by clause 6 of his will dated April 23, 1938, provided: "I bequeath to Charles Death, of 'The Grove,' Monken "Hadley, Barnet, Herts, the sum of 50,000*l.*" By clause 8 he directed "that as regards all the annuities and legacies given "by this my will or any codicil hereto the legacy duty payable "in respect thereof shall be borne by my residuary estate." By clause 10 he provided: "I devise and bequeath all my real "and personal estate not hereby otherwise disposed of "(including all property, whether real or personal, over which "I may have any general power of appointment or disposition "by will) unto my trustees upon trust that my trustees shall "sell, can in and convert into money the same and shall out of "the moneys arising thereby or otherwise forming part of "my estate pay my funeral and testamentary expenses and "debts and the legacies bequeathed by this my will or any "codicil hereto and make provision as aforesaid for the payment "of any annuity so bequeathed and all duties free from which "any legacies or annuities may be bequeathed." He then directed the residue of those moneys to be divided into twelve parts and distributed among several charities.

In answer to a question raised by a summons taken out by

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the Public Trustee on February 2, 1940, Morton J. held that the legacy to Charles Death being payable out of the proceeds of a mixed fund of real and personal estate, must bear its proportion of the estate duty attributable to real estate.

Charles Death appealed. The appeal was heard on October 21, 1940.

H. B. Vaisey K.C. and *Pennycuick* (for *A. F. M. Berkeley*, on war service) for Charles Death. *In re Spencer Cooper. Poë* v. *Spencer Cooper* (1) is not binding on the Court and should not be followed. In any event it does not represent the law laid down by the legislation of 1925. "Testamentary expenses" must now be taken to cover this duty which the executors are under a statutory liability to pay: Law of Property Act, 1925, s. 16, sub-s. 1; Administration of Estates Act, 1925, s. 2, sub-s. 1. In that state of the law the testator must have meant the words to cover this liability. This is a matter of construction. There must be a point at which the words used by a testator are strong enough to cover this duty. The words here used cover it. They referred to *In re Palmer. Leventhorpe* v. *Palmer* (2) and *In re Morris. Skinner* v. *Sanders.* (3)

Wynn Parry K.C. and *Russell Gilbert* for a charity were not called on to argue.

Wilfrid Hunt for the Public Trustee.

SIR WILFRID GREENE M.R. [having stated the facts:] In the year 1907 Swinfen Eady J., as he then was, in the case of *In re Spencer Cooper* (1) decided that: "A general direction "to pay legacies out of a mixed fund or residue charges them "rateably on the portion attributable to realty and personalty ". . . . So far as the legacies are payable out of the portion "attributable to realty they are real estate, and must bear "their own estate duty, notwithstanding a direction to pay "'testamentary expenses' out of the mixed fund." I cannot find, any more than Morton J. could find, any ground for distinguishing that case from the present one. I will refer in a

(1) [1908] 1 Ch. 130.
(2) (1912) 106 L. T. 319.
(3) [1927] W. N. 114.

moment to a particular argument which was presented by Mr. Vaisey based upon the 1925 legislation, but putting that point on one side for the moment, *In re Spencer Cooper* (1) if it be well decided, covers this case. Mr. Vaisey was unable to bring forward any real criticism of it. It may be an unfortunate decision in the sense that it discloses the existence of a trap into which I have no doubt many testators fall, and into which many testators will continue to fall. When a testator gives a legacy, and provides in the usual form that it shall be paid out of the proceeds of sale of his estate, one would expect him not to intend that the legacy should be cut down by being forced to contribute to the estate duty payable in respect of his real estate. Nevertheless, these matters are highly technical. Any provision which touches upon taxation is necessarily of such a character and, however much one might wish to smooth the path of testators by finding a way round this particular trap, it is not open to the Court to do so. I have not been able to think, any more than Mr. Vaisey has been able to think, of any effective criticism of *In re Spencer Cooper.* (1) It has been referred to in one reported case in this Court, *In re Palmer* (2), but there, although it was attacked at the Bar, the Court did not find it necessary to express an opinion upon it. That does not, of course, mean, and must not be construed as meaning, that in any sense the Court was dissatisfied with that decision. The decision of *In re Spencer Cooper* (1) has stood now ever since the year 1907 and, so far as I am aware, it has not been adversely criticized by any text book writer; at any rate, no such criticism was called to our attention and, as I said a moment ago, speaking for myself, I cannot find any flaw in the reasoning of Swinfen Eady J., if I may presume so far as to suggest that the reasoning of that learned judge could contain a flaw. In my opinion, *In re Spencer Cooper* (1) was correctly decided at the time.

That brings me to the only substantial argument put forward by Mr. Vaisey. He says that the legislation of 1925 has altered the position, not in the sense that it has directly

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(2) 106 L. T. 319.

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provided for such a case as this but in the sense that the phrase "testamentary expenses" must now be given a different content to that which it was held to have in *In re Spencer Cooper*. (1) Mr. Vaisey said that having regard to that legislation the phrase now includes the estate duty on real estate. The result of that argument, if it were correct, would be that the executors would be bound to defray this estate duty out of the mixed fund and would then pay the legacies out of the net fund remaining so that the appellant and the other legatees would get their legacies without deduction for estate duty. Of course, the phrase "testamentary expenses" includes, for a technical reason which is well known but into which I need not go, the estate duty on personal estate.

The provisions of the legislation of 1925, to which reference must be made in connection with this argument, are s. 2, sub-s. 1, of the Administration of Estates Act, 1925; s. 53, sub-s. 3, para. (*c*), of the same Act, and s. 16, sub-ss. 1 and 5 of the Law of Property Act, 1925. I need not refer to all these sections at length; suffice it to say that by s. 16, sub-s. 1, of the Law of Property Act, 1925, "A personal representative "shall be accountable for all death duties which may become "leviable or payable on the death of the deceased in respect of "land (including settled land) which devolves upon him by "virtue of any Statute or otherwise." The result, therefore, is that where a testator's real estate devolves upon his personal representatives they are accountable for the death duties which are leviable in respect of that real estate. Now it is said that in view of that provision, and also the language (which I do not propose to read) of s. 2, sub-s. 1, of the Administration of Estates Act, 1925, the testator, when he used the phrase "testamentary expenses," must, in the light of the existing legislation and of the fact that the executor is under a statutory duty to pay his estate duty, be taken to be including in that phrase the liability so imposed upon the executor. If the matter had stood there that argument would have been an attractive one. But it does not stand there, because the

(1) [1908] 1 Ch. 130.

legislature provides in s. 53, sub-s. 3, of the Administration of Estates Act, 1925, with reference to the provisions of that Act, that nothing in this Act shall alter the incidence of any death duties; and sub-s. 5 of s. 16 of the Law of Property Act provides that: "Notwithstanding that any duties are by "this section made payable by the personal representative or "other person aforesaid, nothing in this part of this Act shall "affect the liability of the persons beneficially interested or "their respective interests in respect of any duty and they "shall accordingly account for or repay the same and any "interest and costs attributable thereto to the said Com-"missioners or to the personal representative or other person "accountable as aforesaid, as the case may require." The effect of the legislation, therefore, is, putting it quite shortly, that as between himself and the Revenue a personal representative is accountable for estate duty on this class of real estate passing on the death, but it very carefully preserves the incidence of that duty as regards the persons beneficially interested. In other words, the personal representative is to be the hand to make the payment, in the first instance, but the ultimate burden of the duty is to fall where it ought to fall and where it would have fallen but for this direction. It is the duty of the personal representative not merely to pay the duty to the Revenue but, in dealing with the estate, to see that the burden falls where it ought to fall and, accordingly, when I look at that part of the legislation as a whole, it seems to me clear that the one thing which the Legislature was determined not to do was to allow this legislation to have any effect whatsoever on the position of beneficiaries and the way in which the burden should be borne as between them. That being the character of the legislation I have to put myself in the testator's armchair and see what meaning he was attaching to the phrase "testamentary expenses." Mr. Vaisey's argument would have us stop at that part of the legislation which directs the personal representative to pay the duty on real estate. It seems to me that the matter must be pressed a little further. It must be seen what the nature of that payment is under

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the statute. It is not an ultimate payment which when made is the end of the matter; it is a payment carrying, according to the particular terms of the statute, the obligation on the beneficiary to accept his share of the burden. The testator, therefore, when he used the phrase "testamentary expenses" was using it in a state of the law in which a payment, falling to be made in the first instance by the personal representative, was to be recouped to him by the beneficiaries. That impresses upon that payment a character totally different from that of the payment made by the personal representative when he discharges the estate duty on personal estate; it is a temporary or provisional payment which can be recouped by other persons. That being the nature of the payment under the statute, is it possible to say that the testator included that payment under the phrase "testamentary "expenses"? In my opinion, it is not possible to construe those words so as to produce that effect, and the only remedy of testators, if they wish to free legacies from this portion of the estate duty, is to frame their wills in other language in the future.

This case may have achieved one result, if none other, that it has again brought out of its lurking place this unfortunate rule which I have no doubt has defeated the real wishes of testators in the past and, for all I know, may have done so in the present case.

In my opinion, therefore, that argument fails. Mr. Vaisey very properly called our attention to another matter in the language of this will, which is against him, the fact that clause 10 directs the legal personal representative to make provision for "all duties free from which any legacies or "annuities may be bequeathed." The legacies here are bequeathed free of legacy duty; they are not bequeathed free of any share of estate duty and, although we have not heard a full argument upon that particular phrase, it seems to me that that language would make it impossible to give to the phrase "testamentary expenses" the wide meaning which Mr. Vaisey would have us give to it, limiting as it does the duties for payment of which express provision is made to those duties free from which the legacies were bequeathed, and that does not include estate duty.

In the result, therefore, the judgment of Morton J. was, in my opinion, perfectly right, and the appeal must be dismissed.

CLAUSON L.J. I agree, and I have nothing to add save a word of thanks to Mr. Vaisey for his exceedingly lucid and candid argument.

GODDARD L.J. I agree.

Appeal dismissed.

Solicitors: *Merton Jones, Lewsey & Jefferies; Vandercom, Stanton & Co.*

F. C.

BENNETT J.

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Aug. 20, 21.

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Oct. 21.

In re THORNHILL'S SETTLEMENT.

(1940. T. 637.)

Settled land—Tenant for life of settled land—Bankruptcy—No substantial interest in estate—" Unreasonably refused to exercise any of the " powers conferred on him "—Farms left derelict—Trustee authorized by court to exercise leasing powers, and to sell requisitioned land—Delivery up of documents of title—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 24, *sub-s.* 1.

The tenant for life in possession of an agricultural estate became bankrupt and ceased to have any substantial interest in the land. He repudiated his title as tenant for life, neglected the management of the property and refused to let farms which had become vacant, so that they became derelict. He also refused to sell or let land requisitioned by the War Department :—

Held, by the C. A., affirming the decision of Bennett J., that he had unreasonably refused to exercise his powers of leasing and sale under the Settled Land Act, 1925, and therefore the Court made an order under s. 24, sub-s. 1, of the Act vesting all leasing powers, and the power of sale of requisitioned land in the Public Trustee as trustee of the settlement, and for delivery to the trustee of all documents of title relating to the settled land.

To give the Court jurisdiction to make such an order mere neglect or failure on the part of the tenant for life to exercise his powers is not sufficient ; a definite refusal to do so must be proved.

ADJOURNED SUMMONS.

The summons was taken out by the Official Receiver as trustee in bankruptcy of Michael Joseph Wright McCreagh, the tenant for life in possession of the Drayton Lodge Estate, an agricultural estate of over 3000 acres in the county of Southampton, under a voluntary settlement made by the mother of the tenant for life on February 5, 1906.

The summons asked that the respondent, the Public Trustee as trustee of the settlement, might be authorized by order of the Court under s. 24 of the Settled Land Act, 1925, to exercise in the name of the tenant for life his powers of leasing and sale under the Act on the ground that he was bankrupt and had continuously refused and was still refusing to exercise any of his powers, so that certain farms had become unlet and derelict, and that he also refused to sell or let land requisitioned by the War Department. The facts are fully stated in the judgment of the learned judge.

Alexander Grant K.C. and *H. A. Rose* for the applicant. Sect. 24 gives the Court new powers, and is intended to deal with the case where, as here, the tenant for life is abusing his powers as trustee under the Act. He has failed or neglected to exercise his powers, and has definitely refused, on no reasonable ground, to grant leases of two farms. He has also refused to sell or to lease land requisitioned by the War Department, and the estate has lost compensation. The mansion and three farms are now derelict. The policy of the Settled Land Acts has been to preserve the welfare of the land itself and to render it a marketable article. The tenant for life has for some reason repudiated his title as tenant for life and has never called for a vesting deed: see *Bruce* v. *Marquis of Ailesbury* (1) and *In re Mundy and Roper's Contract.* (2)

L. R. Norris (for *R. H. Hodge*) for the Public Trustee.

The respondent McCreagh in person.

BENNETT J. This is an application by the trustee of the property of the respondent, Mr. Michael Christopher Wright McCreagh, a bankrupt, asking for an order under s. 24 of the Settled Land Act, 1925, that the Public Trustee, the trustee for the purposes of the Settled Land Act, 1925, of a settlement dated February 5, 1906, may be at liberty to exercise in the name and on behalf of Mr. McCreagh, the tenant for life under that settlement, the powers of a tenant for life under the Act in relation to the property, subject to the settlement during the life of Mr. McCreagh or until further order, and for ancillary relief.

The section which founds the jurisdiction, s. 24, sub-s. 1, of the Settled Land Act, 1925, is as follows: "If it is shown "to the satisfaction of the court that a tenant for life, who "has by reason of bankruptcy, assignment, incumbrance or "otherwise ceased in the opinion of the court to have a "substantial interest in his estate or interest in the settled

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(1) [1892] A. C. 356, 365.

(2) [1899] 1 Ch. 275, 288.

"land or any part thereof, has unreasonably refused to "exercise any of the powers conferred on him by this Act, "or consents to an order under this section, the court may, "on the application of any person interested in the settled "land or the part thereof affected, make an order authorizing "the trustees of the settlement, to exercise in the name and "on behalf of the tenant for life, any of the powers of a tenant "for life under this Act, in relation to the settled land or the "part thereof affected, either generally and in such manner "and for such period as the court may think fit, or in a "particular instance, and the court may by the order direct "that any documents of title in the possession of the tenant "for life relating to the settled land be delivered to the "trustees of the settlement."

The jurisdiction arises if the tenant for life is a bankrupt and has acted unreasonably.

The tenant for life, Mr. McCreagh, is a bankrupt. He has been bankrupt twice. He was adjudicated for the first time on February 3, 1924, and for the second time on September 13, 1939. There are still creditors in the second bankruptcy.

The real question which I have to determine is whether the applicant has satisfied me that the tenant for life, the bankrupt, has unreasonably refused to exercise the powers which the Settled Land Act, 1925, gives to him as a tenant for life.

The settled land consists of about 3000 acres of agricultural land in the county of Southampton. It is known as Drayton Lodge Estate. The land is situated for the most part in the parishes of Barton Stacey and Wonston, in the county of Southampton. On February 5, 1906, the land was conveyed by the bankrupt's mother to uses by which the bankrupt became and still is tenant for life in possession.

For some reason which has not been made plain to me, since the date of that settlement the bankrupt has had some grievance, because, when the estate was conveyed to him, it was conveyed to him as a limited owner, and the evidence shows that since the date of the settlement his conduct in relation to the settled land has been abnormal. I am not concerned with that, except for the purpose of having it in mind when considering whether it has been proved that the bankrupt has been acting unreasonably with regard to his refusal to exercise his powers as tenant for life.

There is evidence which satisfies me that for some years past the land comprised in the settlement has been neglected —terribly neglected according to the evidence of Mr. Alan Arnold, a well known land agent, who carries on his business in Winchester. In an affidavit which was filed on August 2 this year Mr. Arnold says that "the estate has during the "last 15 years been allowed to go out of cultivation, although "some attempt appears to have been made to bring one or "two of the derelict farms back into cultivation during the "past year or two. Having made a careful inspection of the "estate, I am bound to say I have never in all the course "of my long experience seen a property in such an uncared "for and desolate state. Farmhouses and cottages have "either fallen down or are in such a dilapidated condition "that repairing them is out of the question. Squatters have "taken possession of cottages and large areas of land were "uncultivated, hedges have grown out into the fields and the "gates and fences have disappeared. Trees have fallen down "and have been left where they fell, in some cases blocking "the farm roads. The rivers, watercourses, hatches, bridges, "and drains in the meadows are all in a neglected state. "In my opnion, it is plain that whoever was responsible for "the management and administration of this fine Hampshire "estate has totally neglected his duties. There is plain "evidence of an utter disregard for either the condition of "the land or the state of the buildings and it is difficult to "estimate the great depreciation in value that has taken "place, entirely due to the gross mismanagement of past "years. It is distressing to realize that 3000 acres of good "farming land should have been allowed to fall into such "a derelict condition."

I think that probably the fact that it has been allowed to fall into that condition is due to some grievance which the bankrupt thinks that he has, because of the settlement made on him by his mother on February 5, 1906.

The fact that the land has been allowed to fall into this deplorable condition is not a ground for exercising the jurisdiction which s. 24 of the Settled Land Act, 1925, confers on this Court. I have to be satisfied by evidence that the tenant for life has unreasonably refused to exercise the powers which that Act gives him—namely, the powers of sale and the powers of leasing and other powers concerned with the disposal of the land comprised in the settlement.

There are three respects in which, in my judgment, the applicant has proved that the bankrupt has unreasonably refused to exercise his powers. The first is in relation to two farms, known as Upper and Lower Cranbourne Farms. The bankrupt was approached in the summer of 1939 by a Mr. R. M. Paterson, who desired to become a tenant of those two farms—farms which were then vacant and derelict.

In an affidavit filed on May 8 of this year Mr. Paterson deposes to the fact that he decided that, if he could obtain reasonable terms from the landlord, he would attempt to bring Upper and Lower Cranbourne Farms back into a proper state of cultivation. He deposes to the fact that he was informed by Mr. Williamson, the Assistant County Agricultural Organizer for the county of Southampton, that a Mr. Notley was acting for the bankrupt. In paragraph 4 of his affidavit he swears to these facts: "On September 21, 1939, "I went to Cocum Farm to see Mr. Notley and then asked "him to make an appointment for me to meet Mr. McCreagh "in London. No appointment was made and on September 26, "1939, I, together with Mr. Notley, journeyed to London and "met Mr. McCreagh at his office, 32, Victoria Street, S.W.1. "I informed Mr. McCreagh of my intentions and asked him "if he would let the farms to me. He replied, however, that, "although he owned the sporting rights, he did not own the "farms. We discussed the question concerning the payment "of tithe and Mr. McCreagh stated that no one could be "found to pay this. At the conclusion of our interview "Mr. McCreagh said to me: 'If I were you, I would take "'possession of the farms and inform the Agricultural "'Committee that you have done so.'"

Mr. Paterson's affidavit proved, in my judgment, that the bankrupt refused to let these two farms to Mr. Paterson, and the question is whether, in refusing to let those two farms to Mr. Paterson, the bankrupt was acting unreasonably.

The bankrupt seeks to justify his conduct by reference to an alleged conveyance, which he says that he made on August 17, 1923, his first bankruptcy having occurred on February 3, 1924. The conveyance which he relies on as justifying his refusal to let the farms to Mr. Paterson is a conveyance by him to his mother of some hereditaments in the parish of Wonston, in the county of Southampton, which comprise these two farms. It is a conveyance which, from the time it was executed by Mr. McCreagh, remained in his possession; he never communicated the fact of the conveyance to his mother; so far as I can see he had no power whatever as tenant for life under the settlement of February, 1906, to make the conveyance and, if it ever was an effective conveyance (which I doubt), it was avoided, because of the effect of s. 42 of the Bankruptcy Act of 1914, when Mr. McCreagh was adjudicated bankrupt on February 3, 1924.

Nobody, I think, who has heard the attempts which the bankrupt, in the course of arguing his case before me, made to justify his conduct would arrive at any other conclusion but that his refusal to let these two farms to Mr. Paterson was unreasonable. It was based on some obsession with regard to the settlement made on him by his mother on February 6, 1906, and on no other reason.

Therefore, I decide that, in refusing to exercise his statutory powers of letting these two farms to Mr. Patterson, the respondent was acting unreasonably.

The second matter is with regard to the requisition of land by the War Office in September, 1939. The War Office wanted to acquire some of the settled land and they served a requisition notice on the bankrupt in respect of it. The requisition included a farm known as Drayton Pump Farm. The respondent refused to deal with the War Office, basing his refusal on the ground that he was not in possession of that farm, but that it was in possession of a tenant of his named Carleton. At one time I was impressed by the argument of Mr. McCreagh in respect to that matter. He is a plausible person; he is a member of the Bar and has some knowledge of the law. The fact is, if one looks at Mr. Arnold's affidavit, that the man who Mr. McCreagh says was his tenant had vacated the farm some years ago and that Drayton Pump Farm when it was requisitioned by the War Office was vacant. To suggest, as Mr. McCreagh did, that it was not in his possession, but was in the possession of Mr. Carleton, was quite untrue.

I conclude in relation to that matter that Mr. McCreagh as tenant for life was acting unreasonably. The third respect —it is a small matter—in which it has been proved that the bankrupt has been acting unreasonably, is with regard to the allotments. These he has refused to let, and his excuse is that the allotments are no concern of the tenant for life, but are something in which his tenant farmers are alone concerned.

With regard to the refusal to let Upper and Lower Cranbourne farms to Mr. Paterson and the refusal to negotiate with the War Office in relation to Drayton Pump Farm, and with regard to the refusal to let the allotments, in my judgment, the bankrupt has been proved to have unreasonably refused to exercise his powers.

On the evidence I think that it is plain that in the interests of everybody interested in the settled land an order should be made authorizing the trustees of the settlement to exercise on behalf of the tenant for life some of the tenant for life's powers. I do not propose, as at present advised and on the evidence before me, to make an order which will authorize the trustees of the settlement to exercise powers of sale over the whole of the settled land, because, as I understand it, the settled land has been in the possession of the ancestors of the present tenant for life since the days of King John. It may well be that the bankrupt might have objections founded on reason against the whole of the estate being disposed of. The order which I propose to make under the section is one which will enable the Public Trustee, as trustee of the settlement, to exercise in the name and on behalf of the tenant for life the powers of sale in relation to any of the land comprised in the settlement and requisitioned by or on behalf of the War Office, and the powers of the tenant for life to lease any part of the settled land and to exercise all powers conferred on a tenant for life by the Act ancillary to the powers of leasing. I will also make an order on the tenant for life to deliver to the trustee documents of title in his possession relating to the settled land. I will authorize the trustee to exercise the powers of the tenant for life to make a contract to sell the land requisitioned by the War Office and to sell it, and I will vest in the trustee the power to direct investment.

H. L. L.

The appellant appealed, appearing in person. The appeal was heard on October 21, 1940.

H. A. Rose for the Official Receiver.
Rawlence for the Public Trustee.

SIR WILFRID GREENE M.R. Mr. McCreagh has endeavoured to persuade us that the order of Bennett J. in this case was wrong. I can find no grounds whatever for criticizing it. In my opinion it was perfectly right and in the circumstances most beneficial. The appeal must be dismissed with costs.

CLAUSON L.J. I agree.

GODDARD L.J. I agree.

Appeal dismissed.

Solicitors: *Farrer & Co.; Tarry, Sherlock & King.*

F. C.

FARWELL J.
1940
Oct. 10.

HINCKLEY AND SOUTH LEICESTERSHIRE PERMANENT BENEFIT BUILDING SOCIETY v. FREEMAN.

[1940. H. 609.]

Practice — Procedure — Mortgagor and mortgagee — Payments under mortgage in arrears—Summons for possession—Order adjourning summons for three months—Inherent power of Court to adjourn case —R. S. C., Order LV., *r.* 5 (*a*).

The Court has an inherent power to adjourn for a definite period on such terms as it thinks just a summons by a legal mortgagee for possession of the mortgaged property brought after the mortgagor has made default in payments due under the mortgage deed.

There is nothing ultra vires in the direction of the Chancery Judges to their Masters (Annual Practice, 1940, p. 1143) that " when " possession is sought and the defendant is in arrear with any " instalments due under the mortgage or charge and the Master " is of opinion that the defendant ought to be given an opportunity " to pay off the arrears, the Master may adjourn the summons on " such terms as he thinks fit . . . ."

Adjourned Summons.

By a deed of mortgage dated October 28, 1937, the defendant, Margaret Elizabeth Freeman, demised a freehold dwellinghouse known as 85, New Road, Stanley Avenue, St. Albans, Hertfordshire, to the plaintiffs, Hinckley and South Leicestershire Permanent Benefit Building Society, for a term of 3000 years to secure a loan of 592*l.* and interest. Under the terms of the mortgage, which was an ordinary building society mortgage, the principal and interest were repayable by subscription payments of 15*s.* 8*d.* a week and the plaintiffs had power to enter into possession of the property on the defendant failing to make the payments for 13 weeks. The defendant's husband, James Freeman, was a party to the deed of mortgage for the purpose of guaranteeing payment of the principal moneys and interest. On February 13, 1940, the defendant owed the plaintiffs a sum exceeding 51*l.* in respect of arrears of payments and on that day the plaintiffs commenced proceedings by originating summons for possession of the mortgaged premises.

On the matter coming before the Master on April 2, 1940, he made an order adjourning the hearing of the case for three months till July 2, 1940, with liberty to the plaintiffs to apply if the defendant made default in paying the weekly sums payable during the three months.

The plaintiffs then obtained the adjournment of the matter to the Court by way of appeal from the Master's order.

Although the defendant had entered an appearance she did not appear when the matter came before Farwell J. on June 5, 1940, and, as he was of opinion that an important question of general interest was involved, he adjourned the hearing with a view to obtaining the assistance of the Attorney-General in arguing the case. The matter now came again before Farwell J.

Geoffrey Cross (for *Milner Holland*, on war service) for the plaintiffs. The Court has no power to refuse an immediate order for possession when it is asked for by a legal mortgagee on proper grounds. This is independent of any question under the Courts Emergency Powers Act. The matter turns on recent changes in the Rules. Before the Judicature Act, 1875, a mortgagee had different remedies in the different courts, namely, foreclosure in the Court of Chancery, and other remedies, including the recovery of possession, in the common law courts. So far as the common law courts were concerned a legal mortgagee was entitled to treat the mortgagor as a trespasser and obtain an immediate order for possession, and the Court never postponed the granting of this remedy unless there was some provision in the mortgage deed that disentitled the mortgagee from obtaining it: *Doe* v. *Maisey*. (1) The attitude of the Court of Chancery was that it never interfered to prevent the mortgagee from entering into possession in the absence of such an express provision in the mortgage deed: see per Sir William Grant M.R. in *Cholmondeley* v. *Clinton*. (2) By the Judicature Acts, 1873 and 1875, the Courts were largely fused and the mortgagee could obtain all his remedies in either Court except foreclosure, proceedings in which were expressly assigned to the Chancery Division. This effected no alteration in the rights of the mortgagee and his right to immediate possession continued.

(1) (1828) 8 B. & C. 767.

(2) (1817) 2 Mer. 171, 359.

The next change was that procedure by originating summons was introduced in 1885: see Order LV., r. 5 (*a*). Under the rule as it then stood the mortgagee could not proceed by originating summons if he was claiming payment or if he was asking for possession alone as opposed to possession incidental to foreclosure: *Wallis* v. *Griffiths.* (1) In 1936 a substantial change was made. By Order v., r. 5 (*a*), every action in which a claim was made by a mortgagee for principal and interest or for possession was assigned to the Chancery Division, and Order LV., r. 5 (*a*), was amended so as to include these claims. The object was to prevent the signing of judgment summarily.

No doubt it was competent to the Rules Committee to make rules to ensure that the mortgagor had notice of proceedings and knew his rights; but if and so far as the Rules are meant to suggest that the Court has a discretion to refuse an order for possession when once the mortgagee's right to it has accrued, they are ultra vires, and this applies to the Chancery Judges' directions to their Masters (Annual Practice, 1940, p. 1143) under which the Master purported to act in this case. The Rules relate only to matters of procedure, and this direction went beyond that and affected a mortgagee's substantive rights. The change effected by the amended Rules was considered in *Redditch Benefit Building Society* v. *Roberts* (2): see also *Temperance Permanent Benefit Building Society* v. *Nevitt.* (3)

Sir Donald Somervell A.-G. and *Andrewes Uthwatt* for the Crown. It is no doubt true that in the old authorities both common law and equity treated the mortgagee as entitled to exercise his right to possession: see *Cholmondeley* v. *Clinton* (4), when Sir William Grant M.R. said that the court of equity never interfered to prevent a mortgagee from assuming possession of the mortgaged property. But the sort of point arising here was not then being considered. The court of equity did not refuse its protection but was very unwilling to interfere with the legal rights of mortgagees: *Ex parte Bayley.*

(1) [1921] 2 Ch. 301.
(2) [1940] Ch. 415, 419.
(3) [1940] 3 All E. R. 237, 239.
(4) 2 Mer. 359.

In re Hart. (1) This does not prevent the Court from having power under its procedural powers to give time for payment of principal and interest. Here the Master by adjourning the case was not interfering with any substantive right but was dealing with a procedural matter within the jurisdiction of the Court. The mere fact that in the past a mortgagee was entitled to sign judgment without going to a Master or a judge does not render an alternative procedure an interference with a substantive right. There can be nothing to prevent a judge from adjourning a case for three months; and it is that power which the Masters are given power to exercise by the direction given to them by the Chancery judges. The recent authorities referred to on behalf of the appellants confirm this view and give the reasons for the change, namely, that in recent times mortgages have been greatly used on sales of small houses to poor people.

FARWELL
J.

1940

HINCKLEY
AND SOUTH
LEICESTER-
SHIRE
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SOCIETY
v.
FREEMAN.

Geoffrey Cross replied.

FARWELL J. This is a summons which is taken out by the Hinckley and South Leicestershire Permanent Benefit Building Society against Margaret Elizabeth Freeman, the wife of James Freeman, and by it the plaintiffs ask for an order that the defendant deliver up possession of the land comprised in the mortgage and further or other relief. The summons was issued on February 13, 1940, at which time there was due under the mortgage a sum of over 50*l.* The matter came before the learned Master on April 2, 1940, and thereupon the Master adjourned the matter for three months but gave the plaintiffs liberty to apply before that date in the event of the current instalments payable under the mortgage not being paid. The plaintiffs did not adjourn the matter into Court for the purpose of getting any alteration in the order which the Master had made, but they have brought the matter into Court claiming that such an order, namely, any order for the adjournment of the hearing of the summons, was an order which the Master—and I think this Court—has no jurisdiction to make, and that there is no course open to this Court other than to make the order for possession which the plaintiffs seek.

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(1) (1880) 15 Ch. D. 223.

Although on the face of it the matter appears to be a simple one dealing only with the particular facts of the particular case, it has been argued on much wider grounds, and Mr. Cross, on behalf of the plaintiffs, has urged that the Court is bound in a case of this sort, to make an immediate order for possession when the matter comes before it and that it is not open to the Court to order any adjournment. The way in which he puts his case is this: he says, and says quite properly, that before the Judicature Act, 1875, a mortgagee had a remedy at common law whereby he could obtain possession of the mortgaged property in certain events. The mortgagee also had a remedy in equity by taking foreclosure proceedings, but so far as the equitable relief was concerned, equity required accounts to be taken and the matter to be gone into before giving to the mortgagee the absolute ownership of the property, whereas in common law a summary order for possession could be obtained and actively enforced by an order for ejectment or in some other way; and he says, and says quite truly, that the court of equity in those days would not and never did interfere by way of injunction to restrain the mortgagee from enforcing such remedy as he had at common law, although the result to the mortgagee might be unfortunate if ultimately an account came to be taken, because the account might be taken against the mortgagee strictly and in a way which might not be beneficial for him; but so far as regards the step at common law which the mortgagee was entitled to take the court of equity would not interfere by injunction.

As a result of the Judicature Act, 1875, the difference between the courts of law and of equity was very largely put an end to, and the two were to a very large extent fused into one, with the result that it was open to the mortgagee to take any remedy that was open to him either in the court of equity or in the courts of law, except that matters of foreclosure and injunction were specially assigned to the Chancery Division and therefore were matters which had to be dealt with in that Division. But the mortgagee still had his right in a proper case to obtain an order for possession in the King's Bench Division and could sign judgment for possession and proceed to get possession and enforce the order in any way he thought right.

In very recent times, in 1936, the Rules have been altered, so that a mortgagee is no longer in a position to sign final judgment for possession in the King's Bench Division. As a result of the alteration in the Rules all matters "in which "there is a claim for payment of principal money or interest "secured by any mortgage or charge upon real or leasehold "property or a claim for possession of any such property "forming a security for payment to the plaintiff of any principal "money or interest shall be assigned to the Chancery Division." That was by Order LV., r. 5(*a*); and there was also an alteration in Order LV., r. 5(*a*), which provides that "Any mortgagee or "mortgagor, whether legal or equitable or any person entitled "to or having property subject to a legal or equitable charge, "or any person having the right to foreclose or redeem any "mortgage, whether legal or equitable, may take out as of "course an originating summons, returnable in the chambers "of a judge of the Chancery Division, for such relief of the "nature or kind following as may by the summons be specified," and the nature of the relief is, "Payment of monies secured "by the mortgage or charge, sale, foreclosure, delivery of "possession, whether before or after foreclosure, by the "mortgagee, redemption, reconveyance, delivery of possession "by the mortgagor." So that under the Rules as they stand, a mortgagee can, by an originating summons, seek in the Chancery Division an order for possession, but he cannot get it by simply signing judgment; the matter has to go in the first instance before the Master in Chancery and he will either see to it that the defendant appears or go into the matter to see that the plaintiff is entitled to his order; but if the plaintiff proves that he is entitled to his order and that he is in fact in the position of a mortgagee who is entitled to possession, he, of course, will get possession and there is nothing in the Rules which can alter the right of the mortgagee—

which he had both before the Judicature Act and after the Judicature Act, and which in my judgment he still has—to possession in proper circumstances. The matter has been carried a little further, because in certain directions which were given by the judges of the Chancery Division to the Masters there is a direction: "When possession is sought and the "defendant is in arrear with any instalments due under the "mortgage or charge and the Master is of opinion that the "defendant ought to be given an opportunity to pay off the "arrears, the Master may adjourn the summons on such terms "as he thinks fit, and if the defendant is in default of appearance "direct the plaintiff's solicitor to communicate such terms to "the defendant by letter." So that if, when the matter comes before the Master in the way I have mentioned, the defendant does not appear, the Master can take steps to insure that the defendant has an opportunity of being heard before any order for possession is made. In the present case the defendant did enter an appearance and was represented before the learned Master, I am told, by her husband. No objection was taken to his stating what the position was from the lady's point of view, and in the result the learned Master directed that the summons should stand over for three months. He also gave the plaintiffs liberty to restore the summons at any time before that date if the mortgagor did not pay the current amounts due under the mortgage. The plaintiffs contend that the Master had no power to give any such direction, and I think they go so far as to say that the general direction contained in the passage I have just read from the Annual Practice, p. 1143, that in a proper case the Master may adjourn the summons if he thinks fit, is a direction which the judges had no power to give to the Masters at all, and that the plaintiffs were entitled to their order for possession and, I take it, his argument goes to this that they were entitled to say: "Give us our order here and now to-day, and if you "do not, you are going beyond the powers of the Court and "refusing the plaintiffs the justice to which they are entitled."

It is a novel proposition to me that this Court has not power to adjourn any matter on any proper ground. No doubt the

Court would not arbitrarily postpone the hearing of a matter indefinitely, because to do so might lead to defeating justice altogether; and a mere arbitrary refusal to hear a particular case is not a course which any judge would take or which would ever become a recognized thing. But to say that the Court has not inherent power to direct that any matter which comes before it should stand over for a period if the Court thinks that that is the proper way to deal with the matter, is an entirely novel proposition to me. As I pointed out in argument, supposing the Court said: I am not going to hear this matter for three months, what power is there which can compel the Court to sit and adjudicate upon the matter until the expiration of that period? No doubt the person aggrieved has a remedy, because he can go to the Court of Appeal (and if the Court of Appeal does not help him he may, with leave, get to the House of Lords); and the Court of Appeal may say the matter ought to be dealt with at once and send it back to the judge who has adjourned it, or to some other judge, to deal with the matter as that Court may direct; but apart from that, I know of no method beyond taking steps to have such a judge removed from his office on the ground of his misconduct, by which the Court can be compelled to hear the matter there and then on the ground that there is no jurisdiction to say: "I shall adjourn this for "reasons which appear to me to be sufficient" for a definite period.

In my judgment there is nothing whatever which is in any way ultra vires or improper in the direction which the Master has given in this case; nor do I think there is anything improper in the general direction which is to be found in the Annual Practice. It is to be noted that that direction does not direct a Master in every case of this sort peremptorily to adjourn the matter for three months; it is a direction that the Master may adjourn it for three months if, in all the circumstances, he thinks that is the proper way of doing justice between the parties. If the Master is wrong in a particular case in thinking that that is the way to proceed, the litigant has his remedy by taking the matter to the judge, and if the judge takes the view which the Master took and the litigant is still dissatisfied, he can go higher and obtain, if he can, a reversal of the judge's direction, but it is quite beyond anything that I have ever before heard suggested to say that the Court has no jurisdiction under its own procedure in a proper case to direct that a matter shall stand over for such period as the Court, in all the circumstances, thinks justice requires.

In my judgment the Master had jurisdiction to make the order which he has made, and so far as this summons seeks to get the Master's direction reversed on the ground that he had no jurisdiction to make it, the summons, in my judgment, fails and should be dismissed.

Of course, there is still the question of the relief claimed by the plaintiffs in the summons, and the three months for which the Master adjourned the matter has long since expired. I am told also that none of the instalments have been paid since the Master granted the adjournment.

I think that it will be best in the circumstances to send this matter back again into Chambers with a direction to the Master that if he is satisfied that none of the payments have been made during the last three months, he shall make an Order for possession; but, of course, that will be subject to the defendant's right to get relief under the Emergency Powers Act.

Solicitors: *Corbin, Greener & Cook, for Oakey & Son, Hinckley; Treasury Solicitor.*

H. C. G.

LEE *v.* LEE.

[1932. L. 1023.]

MORTON J.

1940

July 26.

Practice — Partnership action — Dissolution — Receiver and manager appointed—Fund in Court exceeding 1000*l.* — *Application by summons for payment of receiver's remuneration—R. S. C., Order* LV., *r.* 2, *sub-r.* 13.

An order for the dissolution of a partnership having been made in a partnership action, a receiver and manager was appointed in 1929 to carry on the business. In 1940 a sum of 1005*l.* was certified by the Master as being due to him and a summons was taken out seeking payment thereof out of the sum of 3514*l.* then in Court to the credit of the action :—

Held, that the application was "connected with the management "of property" and that accordingly, under R. S. C., Order LV., r. 2, sub-r. 13, the Court had jurisdiction to make the order on an application by summons.

ADJOURNED SUMMONS.

On May 9, 1928, William Lee (hereinafter called "the respondent") commenced a partnership action against George Lee (hereinafter called "the applicant"). On March 22, 1929, the Court ordered that the partnership business carried on between them be dissolved, that certain accounts and inquiries be taken, and that it be referred to the Registrar of the Chester District Registry to appoint a proper person to collect and get in and receive the debts due and other assets, property and effects belonging to the partnership business, and to manage the same. On March 26, 1929, Edward Williams (hereinafter called "the receiver") was duly appointed receiver and manager, and thereafter managed the partnership business. By a certificate dated June 20, 1940, the Master certified that 1005*l.* 2*s.* 7*d.* was due to the receiver as the balance of his account, the sums due to him in respect of remuneration being taken into consideration. There was in Court to the credit of the action the sum of 3514*l.* 18*s.* 3*d.*

By this summons the applicant asked for payment to the receiver out of the funds in Court of the amount certified to be due to him.

Timins for the applicant. The Court has jurisdiction to make the order sought on an application by summons as this is "connected with the management of property": R. S. C., Order LV., r. 2, sub-r. 13 (1); *In re Terry. Terry* v. *Terry* (2)

J. L. Stone for the respondent. This application is misconceived. It is not "connected with the management of "property." In an administration action the Court takes upon itself the administration of the estate but in a partnership action it merely directs the taking of certain accounts and the making of certain inquiries. It is similar to a debenture holder's action. Since the sum in Court exceeds 1000*l.* there is no jurisdiction to make this order: R. S. C., Order LV., r. 2, sub-r. 2; *May* v. *Dowse.* (3) The applicant should have proceeded by way of petition instead of taking out a summons.

W. Waite for another respondent, the Midland Bank, Ld. If the contention of the applicant were accepted there could be no application which was not "connected with the management "of property" within R. S. C., Order LV., r. 2, sub-r. 13.

Timins in reply.

MORTON J. [having stated the facts:] The summons asks that directions be given for payment out of the fund in Court of the sum of 1005*l.* 2*s.* 7*d.* to Mr. Williams. Objection has been taken that there is no jurisdiction to make such an order on an application by summons and it is pointed out that the sum in Court exceeds 1000*l.* Reference has been made to Order LV., r. 2, sub-r. 2, which imposes the limit of 1000*l.*, and also to the decision of Pearson J. in *May*

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(1) By R. S. C., Order LV., r. 2: "The business to be disposed of in "chambers by judges of the "Chancery Division, shall consist "of the following matters, in "addition to the matters which "under any other rule or by "statute may be disposed of in "chambers: (1.) Applications for "payment . . . . to any person "of any cash . . . . standing to "the credit of any cause or matter "where there has been a judgment "or order declaring the rights ". . . . of any person. (2.) Applications for payment or transfer to any person of any cash ". . . . standing to the credit of "any cause or matter where the "cash does not exceed 1000*l.* . . . "(12.) Applications as to the "guardianship and maintenance "or advancement of infants. "(13.) Applications connected "with the management of property . . . ."

(2) [1929] 2 Ch. 412, 415.

(3) (1884) W. N. 122.

v. *Dowse.* (1) Counsel for the applicant does not rely upon sub-r. 1 of r. 2; he does not suggest that the Master's certificate in this case is equivalent to "a judgment or order "declaring the rights . . . . of any person" and I express no opinion as to whether the Master's certificate could be so treated. Counsel relies upon sub-r. 13 of r. 2, which is as follows: "The business to be disposed of in chambers by "judges of the Chancery Division, shall consist of the following "matters, in addition to the matters which under any other rule "or by statute may be disposed of in chambers: . . . . (13.) "Applications connected with the management of property." The position is that a Master has certified that the balance due to this receiver, who is managing the partnership property, is a certain sum and the applicant asks that this sum may be paid to the receiver out of the fund in Court which is available for the purpose. I should have thought prima facie that such an application was "connected with the management "of property." It is said, however, by counsel for the respondents, that the applicant cannot get an order in this case on a summons and that he must proceed by way of petition. I find considerable assistance in the case of *In re Terry. Terry* v. *Terry* (2) in considering the problem before me. There the judge in chambers in an administration action had sanctioned the expenditure of a sum of 230*l.* on the carrying out of necessary repairs and improvements at three farms belonging to the estate. The question before Clauson J. (as he then was) was whether an order for payment of that sum out of the fund in Court, which exceeded 1000*l.*, could be made on a summons or whether a petition was necessary. Clauson J. said this (2): "Now, all the counsel are agreed "that the primary practice of the Court is to order funds to "be paid out of Court only upon the hearing—whether the "original hearing or the hearing on further consideration—of an "action or on a petition, and that if an order for payment of "funds out of Court is to be made otherwise than on the hearing "of the action or on petition, that order will be irregular, "unless something is found in the rules which authorizes the

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(1) (1884) W. N. 122.

(2) [1929] 2 Ch. 412, 415.

"making of such an order." The learned judge then proceeded to consider Order LV., r. 2, sub-rr. 1, 2, 3 and 12. He said this (1) : "Now, I am encouraged by the decision of "Lawrence J. to which I have just referred to give a somewhat "wide meaning to sub-r. 12"—that is the sub-rule which deals with "applications as to the guardianship and main-"tenance or advancement of infants" and the case is that of *In re Harrison's Trusts.* (2) He proceeded: "If an "application were before me relating to the guardianship and "maintenance or advancement of an infant and part of the "application were that a sum should be advanced for the "infant out of a fund standing in Court to the infant's credit, "I should consider the sub-rule to authorize me, not only to "sanction the advancement of the infant by expending upon "him such and such a sum, but also to direct the sum to be "paid out of Court in order to carry into effect the order for "the advancement of the infant. It is no good making an "order that the infant be advanced, unless the means by "which he is to be advanced are provided. I now come to "sub-r. 13: 'Applications connected with the management "'of property.' In my view that rule must similarly be "construed practically. If there were an application before "the judge in chambers and he were satisfied that a sum "ought properly to be expended out of capital in connection "with the management of the property—and that, of course, "is this case—can it be the true meaning of the sub-rule "that all he can do is to say that the money shall be spent, "and that he must then send the parties away to present "a petition to get the money out of Court?" In the case before me the Master was satisfied that this particular sum was due to the receiver and that sum was, in my view, a sum due to him in connection with the management of property. The learned judge continued: "I cannot conceive that that "is the true meaning of the sub-rule. In my view, the sub-"rule gives the judge in chambers, on an application connected "with the management of property, full jurisdiction to do "whatever is proper, within the bounds of the Court's powers,

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(1) [1929] 2 Ch. 417.

(2) Unreported.

"to carry out and effectuate the order which he proposes to "make, and if he is satisfied that the fund in Court is properly "applicable for the purposes, in my view he has authority, "under that sub-rule, to make in chambers an order that the "money shall be so applied, which will, of course, involve an "order that the money be paid out of Court. This sub-rule "is entirely separate from sub-r. 2, and the fact that sub-"r. 2 relates, on the construction which I feel bound to "put upon it in view of the decisions, to funds of a particular "size, not exceeding a particular amount, does not seem to "me to be material, in considering what the powers are which "are given to the Court under sub-r. 13. Accordingly, on "that ground, I hold that it is within the jurisdiction of the "judge in chambers to make such an order as is asked for "in this case, and none the less because it involves a direction "that certain moneys shall be paid out of Court."

Accepting as I do the view of Clauson J. which I have just quoted, it seems to me that this is an application "connected "with the management of property," that the fund in Court is properly applicable for the payment of the sum found due to the receiver and that I ought to give such a construction to sub-r. 13 as would enable me to make the order sought. It is true that the case before me is not precisely the same as that before Clauson J. as there has been here, prior to the application by summons, no sanction by the judge of the expenditure of a particular sum. There has, however, been a finding by the Master that this sum is due to the receiver; it is due to him in respect of his management of the property under his control and, in my view, the two cases are analogous. I decline to put so narrow a construction upon sub-r. 13 as is contended for by counsel for the respondents.

In those circumstances I propose to make the order as asked by the summons.

Solicitors: *Kinch & Richardson, for Percy Hughes & Roberts, Birkenhead; Bentley, Taylor & Co.; Hamlins, Grammer & Hamlin.*

F. C.

MORTON J.

1940 July 26.

In re QUIRK.

PUBLIC TRUSTEE *v.* QUIRK.

[1940. Q. 1566.]

Will—Construction—Testator a British subject ordinarily resident in Turkey—Bequest of freehold land in France " free of all death duties " —Whether French duty included.

A British subject ordinarily resident in Turkey by his will devised " free of all death duties " certain freehold land in France. On his death there was payable in respect thereof a French duty on transfer by death. No other duty in England or elsewhere was payable in respect of it, either at the date of his death or at the date of the will :—

Held, that this duty was payable out of the estate and not by the devisee.

In re Norbury. Norbury v. *Fahland* [1939] Ch. 528 distinguished.

ADJOURNED SUMMONS.

The testator, John Quirk, died on October 22, 1939, at a sanatorium in Switzerland, leaving his wife Inna Markovna Quirk and his stepdaughter Princess Nicolas Troubetzkoy surviving him.

By his will, dated July 1, 1938, he described himself as "a British subject domiciled in England but ordinarily "resident at Number 4, Berna Apartment, Silahane Djadessi "Nichantash, Istanbul, in the Republic of Turkey." By clause 4 he bequeathed to his wife "free of all death duties "my freehold land and messuage known as Clos Sainte Anne "in the Department of Var Alpes Maritimes in the Republic "of France for her own absolute use and benefit." By clause 5 he bequeathed to her "free of all death duties payable at my "decease" the use and enjoyment during her life of all his furniture and other articles of household use or ornament not otherwise specifically disposed of. By clause 7 he directed his trustees to pay the pecuniary legacies bequeathed by his will "including the duty on all legacies and annuities "bequeathed free of duty." By clause 10 he directed that during the joint lives of his wife and stepdaughter his trustees should pay half the income of a trust fund to each of them, provided "that if at the end of any year . . . . my wife's "moiety for that year shall be less than 1200*l.* net after "deduction of any United Kingdom income tax payable, then "the income of my said wife for that year shall be made "up to such net sum of 1200*l.* out of my step-daughter's "moiety . . . ."

On the testator's death there was payable in respect of the house in France a French duty on transfer by death known as the "droits de mutation par décès." No other duty in England or elsewhere was payable in respect of it, either at the date of the testator's death or at the date of his will.

On June 17, 1940, the trustees of the will took out a summons to determine (inter alia) whether this duty was payable out of the estate of the testator or should be borne by his wife. It was agreed by all parties that the matter should be decided on the footing that the nature of the duty was still as set out in the evidence given in the case of *In re Scott. Scott v. Scott.* (1)

F. McMullan for the trustees.

C. D. Myles (*Henry E. Salt* with him) for the wife. The gift "free of all death duties" covers this French duty: *In re Scott.* (2) This testator was ordinarily resident abroad and was dealing with immovable property in a foreign country. *In re Norbury. Norbury* v. *Fahland* (3) is distinguishable on that ground.

L. M. May for persons interested in residue. *In re Norbury* (3) is similar to the present case. The only duties payable out of the estate are such as may be imposed by English law, this being an English will by an English testator. The French duty is not so payable.

T. K. Wigan for another person interested in residue. This case is covered by the authority of *In re Norbury.* (3)

MORTON J. [having stated the facts :] So far as the evidence

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(1) [1915] 1 Ch. 592.
(2) Ibid. 609.
(3) [1939] Ch. 528.

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before me goes, I have to deal with the will of a British subject domiciled in England, who described himself as ordinarily resident in Turkey and who, at the date of his will and at the date of his death, owned a freehold house in France.

It is agreed by all the counsel concerned that, as this house is immovable property situate in a foreign country, no duty is payable in respect of it in the United Kingdom on the testator's death, and the only duty payable in respect of it, either at the date of the will or at the date of the death, is this French "mutation" duty. In these circumstances, I should have been disposed, apart from authority, to hold that the very general words "free of all death duties" would cast the burden of discharging the "mutation" duty upon the estate in exoneration of the devisee.

I have been referred to two authorities which may bear upon the matter. The first is the case of *In re Scott.* (1) I do not find that this case is of any real assistance so far as the decision goes, because there the Court of Appeal had to construe the phrase "free of legacy duty" and to determine whether the words "legacy duty" could extend to the French "mutation" duty. It is plain, I think, that that was a very different case from the one which I am considering. But Mr. Myles, for the widow, rightly relied upon a passage in the judgment of Phillimore L.J., who said this (2): "The "testator has used words of art, and though it may be that "from other parts of the will you may deduce the view that "he has used words of art inartificially, unless you can make "this deduction you must treat those words of art as meaning "what they technically do mean. 'Legacy duty,' to my "mind, is a word of art, and means duty payable under "English or British law. If there was no legacy duty payable, "if there was nothing in the way of any duty on the succession "but the mutation duty, one might then be driven to suppose "that the testator had used a word of art in an artificial "sense, but, inasmuch as there is ample to satisfy the words "'free of legacy duty,' there is no reason for our supposing "that they mean more than they say." I find that observation

(1) [1915] 1 Ch. 592.

(2) Ibid. 609.

of some assistance, because it shows that if there had been no duty to which the words could apply other than the "mutation" duty Phillimore L.J. might have been driven to treat even the term of art "legacy duty" as extending to "mutation" duty. That passage fortifies me in the view which I have formed, apart from authority, that the words "free of all death duties" extend to and cover the "mutation" duty payable in France.

The other authority to which I was referred was the recent case of *In re Norbury* (1), a decision of Bennett J. The headnote is as follows: "Where an English testator by an "English will gives a pecuniary legacy 'free of duty' the "only duties payable out of his estate in respect of the legacy "are those imposed by English law, in the absence of any "contrary intention expressed in the will." In that case the testator, according to the statement of facts, "bequeathed "free of duty the sum of 15,000*l.* to his trustees with powers "of appropriation of securities and investment upon trust "to pay the income thereof to Frau Mita Armska Esterhazy "Fahland (whose address was given as in Berlin) during her "life without power of anticipation during any coverture "and on her death the said trust legacy was to fall into and "form part of the testator's residuary estate. The testator "devised and bequeathed all his residuary estate to his "trustees upon trust for conversion and to pay and provide "for his funeral and testamentary expenses and the legacies "bequeathed by his will or by any codicil thereto and the "duties on all legacies and annuities bequeathed free of duty." Subject thereto he made certain dispositions of his residue. The statement of facts continues: "Frau Fahland was a "German national residing in Berlin, and at the date of the "will had been resident there for many years. Under German "law a tax known as the inheritance tax was payable by her "in respect of the settled legacy of 15,000*l.* She claimed "that the expression 'free of duty' in the gift of the legacy "to her included freedom from such inheritance tax. The "plaintiffs took out this summons for the determination of

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(1) [1939] Ch. 528.

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"the question whether they as executors ought to pay the "German inheritance tax on the legacy out of the testator's "estate, or recoup to Frau Fahland the amount of any duty "paid by her on the legacy, or whether the freedom from duty "in the clause referred to did not extend to the German "inheritance tax. There was evidence by Dr. E. J. Cohn, a "German lawyer, that inheritance tax was payable by any "one living in Germany in respect of all property acquired "by such person under a will or an intestacy or a donatio "inter vivos or a donatio mortis causa. It was payable "at the rate of 20 per cent. on the value of Frau Fahland's "life interest in the legacy. The beneficiary was the only "person liable to pay the tax, which was payable notwith-"standing that the property acquired came from a person "living outside Germany and the assets out of which the "interest came were situate in a country other than Germany. "The tax was levied from time to time on the income as "received." Bennett J., after saying that the point which he had to decide was not covered by the Court of Appeal's decision in the case of *In re Scott* (1), proceeded as follows (2): "An English testator must be presumed to know something "about the duties the English law imposes both upon his "estate and upon beneficiaries under his will when he dies; "but not many of them, I suppose, know much if anything "about death duties imposed by the laws of foreign countries. "Nor, I suppose, would many of them contemplate some "additional burden being imposed upon their estates by a "change of residence on the part of a person to whom a "legacy had been given. In the absence of authority, I "hold that, where an English testator by an English will "gives a pecuniary legacy 'free of duty,' the only duties "payable out of his estate in respect of the legacy are duties "imposed by English law, unless there are words in the will "which make it clear that duties imposed by the law of a "foreign country are to be paid thereout."

If I had been dealing with a case of a pecuniary legacy given by an English testator in an English will I should have

(1) [1915] 1 Ch. 592.

(2) [1939] Ch. 528, 530.

applied the rule there laid down by Bennett J., with which I respectfully agree, but I am dealing with the case of a devise of immovable property in a foreign country. I think the case before me is to be distinguished on several grounds from *In re Norbury.* (1) In the first place there is the fact that at the date of the will and at the date of the testator's death there was no duty payable in respect of this land other than the "mutation" duty. In the second place the observation of Bennett J. that not many English testators would "contemplate some additional burden being imposed "on their estates by a change of residence on the part of "the person to whom a legacy had been given" has no application to a case such as the present, where the gift is one of an immovable property. Even if there had been no other grounds for distinguishing this case from *In re Norbury* (1) I should have considered these two grounds sufficient. In the third place, this testator was a man who, as appears from his will, was ordinarily resident in Turkey and owned real property in France. I think that he was more likely to have in mind duties payable in a foreign country than a testator who was resident in England and owned no property abroad. That is, perhaps, a somewhat small indication of intention, but I think it is worth mentioning. In the fourth place, the fact that in clause 10 the testator used the phrase "United Kingdom income tax" instead of simply "income "tax" shows that when he intended to refer only to something payable under the law of the United Kingdom, he expressed that intention in clear words.

For these reasons I think that upon the true construction of the will the French "mutation" duty ought to be paid by the plaintiffs out of the testator's estate.

Solicitors: *Pyke, Franklin & Gould; Guscotte, Wadham, Thurland & Howard.*

F. C.

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(1) [1939] Ch. 528.

MORTON J.

1940

Sept. 20.

BENABO *v.* WILLIAM JAY AND PARTNERS, LIMITED.

Practice—Attachment—Action against company—Order for payment of money—Service of copies on directors—Memorandum addressed to directors—Non-compliance—Motion for leave to issue writs of attachment against directors—R. S. C., Order XLI., *r.* 5; *Order* XLII., *r.* 31—*Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 370, *sub-s.* 1.

The plaintiffs, in an action in which a limited company had been ordered to pay a sum of money, served on the directors, at its registered office, copies of the order indorsed with the following memorandum: "If you, W. A. J. and J. S. H., directors of the "within named W. J. & P., Ld., neglect to obey this order by "the time therein limited you will be liable to process of execution "for the purpose of compelling you to obey the same order." The order was not obeyed and they moved for leave to issue writs of attachment against the directors under Order XLII., r. 31:—

Held, (1.) that the method of service was sufficient under s. 370, sub-s. 1, of the Companies Act, 1929, to constitute service on the company, but (2.) that the memorandum should have been addressed to the company and not to the directors and that, accordingly, it did not comply with the provisions of Order XLI., r. 5; (3.) that therefore the writs of attachment should not issue.

MOTION.

On February 23, 1940, Albert Benabo and Lewis Benabo (hereinafter called "the plaintiffs") commenced an action against William Jay & Partners, Ld. (hereinafter called "the defendant company"), for an account of rent and profits received and payments made by it as agent for the plaintiffs and for payment of the amount found due. On July 3, 1940, it was ordered that the defendant company should on or before July 17, 1940, or subsequently within four days after service upon it of the order, lodge in court the sum of 118*l.* 17*s.* 8*d.*, shown by the account to be in its hands. On August 19, 1940, copies of the order were served on William Aries Justice and James Sydney Herbert, the directors of the defendant company (hereinafter called "the directors"), at the registered office thereof. Each copy had indorsed thereon the following memorandum: "If you, William Aries Justice "and James Sydney Herbert, directors of the within named "William Jay & Partners, Ld., neglect to obey this order by

" the time therein limited you will be liable to process of " execution for the purpose of compelling you to obey the " same order." The order was not complied with and the plaintiffs served notice of motion dated August 30, 1940, for leave to issue writs of attachment against the directors " for " the contempt of the defendant company in not lodging in " court . . . . the sum of 118*l.* 17*s.* 8*d.* in the hands of the " defendant company . . . . pursuant to the order in that " behalf in this action. . . . ." In September, 1940, the directors swore an affidavit as to their means and the circumstances in which the sum was not paid. They directed themselves to explaining their personal positions and the only information as to the defendant company's resources was that it held a lease of its business premises.

Mulligan for the plaintiffs. This case falls within Order xlii., r. 31 (1), and the order can be enforced by attachment against the directors of the company. There has been wilful disobedience to the order and the company is answerable for it. This is a stronger case than *Litchfield* v. *Jones.* (2)

Mendal for the directors. The order was never served on the company and so the time limited thereby has not begun to run. Further, the remedies against the company and against the directors are alternative: *Iberian Trust, Ld.* v. *Founders Trust and Investment Co., Ld.* (3) Accordingly the memorandum indorsed on the copies of the order served should have referred to the company. Being addressed to the directors the copies as indorsed did not comply with Order xli., r. 5. (4) No wilful

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(1) By Order xlii., r. 31: " Any judgment or order against " a corporation wilfully disobeyed " may, by leave of the Court or " a judge, be enforced by sequestration against the corporate " property or by attachment " against the directors or other " officers thereof, or by writ of " sequestration against their " property."

(2) (1887) 36 Ch. D. 530.

(3) [1932] 2 K. B. 87.

(4) By Order xli., r. 5: " Every " judgment or order made in any " cause or matter requiring any " person to do an act thereby " ordered shall state the time, or " the time after service of the " judgment or order, within which " the act is to be done, and upon " the copy of the judgment or

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disobedience on the part of the company has been shown. In any event Order XLII., r. 31, was never meant to apply to an order for payment of a sum of money. If these directors could be sent to prison there would be an infringement of the Debtors Act, 1869, and the rule cannot be construed to have such an effect. Finally, the Court should not, in the circumstances of the case, exercise its discretion to give the leave sought.

Mulligan in reply. The company was clearly served with the order: Companies Act, 1929, s. 370, sub-s. 1. The service on the only directors at the company's registered office was equivalent to service on it. The memorandum indorsed on the copies served was properly addressed to the directors: *McKeown* v. *Joint Stock Institute, Ld.* (1) Order LXII., r. 31, clearly envisages two distinct alternatives. It is sufficient if the indorsement gives the person liable notice that it is intended to take proceedings to enforce the penalties; its only object is to give such notice. Here the company knew quite well that it was bound by the order. Further, the onus is on the defendants to prove that there was no wilful disobedience to the order and they have not discharged it: *Lewis* v. *Pontypridd, Caerphilly and Newport Ry. Co.* (2)

MORTON J. [having stated the facts:] Mr. Mendel, for the directors of the defendant company, relied on five grounds of defence and submitted that on those grounds, or some one or more of them, I should refuse to make the order sought by the plaintiffs.

First he said that the company was never served with the order of July 3, 1940; and that therefore the four days limited thereby for obedience to it have not expired. In my view that argument is not well founded. By s. 370, sub-s. 1,

"order which shall be served "upon the person required to "obey the same there shall be "indorsed a memorandum in the "words or to the effect following, "namely: 'If you the within "'named A. B. neglect to obey "'this judgment [or order] by "'the time therein limited, you "'will be liable to process of "'execution for the purpose of "'compelling you to obey the "'same judgment [or order]'."

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(1) [1899] 1 Ch. 671.

(2) (1895) 11 Times L. R. 203.

of the Companies Act, 1929: "A document may be served "on a company by leaving it . . . . at the registered office "of the company." Copies of the order were left at the registered office of the company, and if the indorsement had been in proper form, I should have held that the order had been properly served.

Mr. Mendel's second point is that the indorsement is wrong, in that it does not comply with the provisions of Order XLI., r. 5. That rule is as follows: [His Lordship read the rule, and continued:] Here the copies of the order served were not so indorsed. The indorsed memorandum should have referred to the company, not to the directors. Order XLII., r. 31, provides as follows: [His Lordship read the rule, and continued:] Under that rule the present application is made. It was held by Luxmoore J. (as he then was) in *Iberian Trust, Ld.* v. *Founders Trust and Investment Co., Ld.* (1) "that the remedy against a director of a company by "attachment given by Order XLII., r. 31, was an alternative "remedy, and the plaintiff company could not pursue that "remedy unless they were also in a position to proceed against "the defendant company and that they could not do "because the copy of the order served upon the defendant "company did not comply with Order XLI., r. 5."

The remedy being alternative, it is incumbent upon the plaintiffs to satisfy me that the defendant company, having been properly served with a copy of the order indorsed with a memorandum in proper form, has failed to comply with it. If the memorandum had been in proper form, and if the order had been wilfully disobeyed, the plaintiffs would have had alternative remedies on disobedience "by sequestration against "the corporate property or by attachment against the "directors." They are not in a position to pursue either of these remedies because of the defect in the indorsement on the copies of the order served on the directors. In my view this is not wholly a technical point, and this fact is well illustrated by the evidence put in by the directors. The real point which should be dealt with by the evidence is whether

(1) [1932] 2 K. B. 87.

the defendant company has been guilty of wilful disobedience and whether it has funds out of which it might have discharged the debt. The directors, however, have directed themselves to explaining their personal positions, and the only information supplied about the position of the company is that it holds a lease of its business premises. I think this is a direct result of the indorsed memorandum being incorrectly framed. In an application for leave to issue a writ of attachment the rules must be strictly complied with. Mr. Mulligan referred me to *McKeown* v. *Joint Stock Institute, Ld.* (1), but unfortunately it does not appear from the report what was the precise form of the memorandum indorsed on the copy of the order. That case is of no real assistance to him. It goes only to show that if the order had not been served on the directors the alternative remedy of attachment would not be open to the plaintiffs.

Mr. Mendel's third point was that wilful disobedience by the company has not been shown. Fourthly, he contends that Order XLII., r. 31, is not directed to failure to make a payment of money and that if it were it would be in conflict with the Debtors Act, 1869. It is unnecessary for me to express an opinion on either of these matters in view of my decision on his second point.

Finally, the remedy is discretionary, and even if I were of opinion that the provisions of Order XLI., r. 5, had been strictly complied with, I doubt if I should have exercised my discretion in this case in favour of the plaintiffs.

The result is that the motion must be dismissed with costs.

Solicitors: *Brundrett, Randall & Whitmore; F. Bernard Smith.*

(1) [1899] 1 Ch. 671.

F. C.

O'HARA *v.* LIPMAN.

[1939. O. 1604.]

MORTON J.

1940

Sept. 25; Oct. 1.

Emergency legislation—Contract for sale of land—Provision for forfeiture of deposit—Purchaser's failure to complete—Notice by vendor specifying default and requiring purchaser to make it good—Courts (Emergency Powers) Act, 1939 (2 & 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2.

A contract for the sale of land entered into in August, 1939, provided that if the purchaser failed to perform his part of it the vendor might give him notice specifying the default and requiring him to make it good and that if he did not comply with its terms the deposit money should be forfeited and the contract should be void. The purchaser having failed to complete his contract by September 30, 1939, the date fixed for completion, the vendor served such a notice on him:—

Held, that in serving the notice the purchaser was not proceeding to exercise a remedy by way of forfeiture of a deposit within s. 1, sub-s. 2 (*a*) (iv.), of the Courts (Emergency Powers) Act, 1939, and accordingly was not obliged to obtain the leave of the Court before doing so.

WITNESS ACTION.

In August, 1939, the defendant, John Lipman, entered into a contract to purchase certain freehold shops from the plaintiff, Elizabeth O'Hara. The contract incorporated the Law Society's General Conditions of Sale of 1934, para. 32 (i.) of which provided: "If the purchaser shall fail to perform "his part of the contract the vendor may give to the purchaser "or to his solicitor at least 14 days' notice in writing specifying "the default and requiring the purchaser to make good the "same before the expiration of the notice. If the purchaser "does not comply with the terms of the said notice (*a*) the "deposit money, if any, shall be forfeited to the vendor . . . . "(*b*) the vendor may resell the property without previously "tendering a conveyance to the purchaser . . . . (*c*) the contract "shall . . . . become void . . . ." A deposit of 925*l.* was paid to the plaintiff's solicitors. September 30, 1939, was the date fixed for completion. By a letter dated October 17, 1939, the defendant's solicitors intimated that owing to circumstances arising out of the war, which had been declared since the contract, he was unable to proceed with it. On October 21, 1939, the plaintiff's solicitors replied: "Our "client is most anxious to give your client reasonable time "to complete his contract and she has instructed us to extend "the time for completion until November 30 next, but if we "do not receive the engrossment of the conveyance for "execution by our client and the balance of the purchase "money on or before that date, the vendor must exercise "her remedies and claim the forfeiture of the deposit." The defendant failed to complete and the plaintiff, desiring to forfeit the deposit, brought this action against him.

E. M. Winterbotham for the defendant. Before serving the notice contemplated in para. 32 of the conditions of sale the plaintiff was obliged to obtain the leave of the Court under s. 1, sub-s. 2 (*a*) (iv.), of the Courts (Emergency Powers) Act, 1939 (1), since she was proceeding to exercise a remedy available to her by way of the forfeiture of the deposit. No such leave was obtained before the letter of October 21, 1939, was written. Accordingly the notice was ineffective.

H. B. Vaisey K.C. and *Elverston* for the plaintiff. Under the terms of this contract the forfeiture arises from the act of the defendant himself in failing to complete the purchase and not from anything done by the plaintiff. Accordingly there is no room for the application of the Act. The notice was effective.

MORTON J. [having stated the facts and held that the letter of October 21, 1939, was a notice within para. 32 of the general conditions of sale :] I now come to the point as to which I felt some doubt in the course of the hearing. Mr. Winterbotham contended that in giving the notice of October 21, 1939, the plaintiff was proceeding to exercise a remedy which was available to her by way of the forfeiture of the deposit within s. 1, sub-s. 2 (*a*) (iv.), of the Courts (Emergency Powers) Act, 1939, and that she was precluded by the terms of that subsection from doing this without the leave of the Court. I cannot accept this contention. When her solicitors wrote the letter, the plaintiff was not, in my view, exercising a remedy which was available to her by way of forfeiture of the deposit. She was giving a notice which might have had one of two results. The defendant might have contrived to find the balance of the purchase money and to complete the purchase. If he failed to do so, then the contract under its own terms would be void and the deposit would be forfeited. As he did so fail, the forfeiture arose directly out of his failure without any fresh intervening act on the part of the plaintiff. I cannot construe the Act as covering the sending of such a notice as this.

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(1) By the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2 : " Subject to the provisions of this " section, a person shall not be " entitled, except with the leave " of the appropriate court :—(*a*) " to proceed to exercise any " remedy which is available to " him by way of . . . . (iv.) the " realisation of any security or " the forfeiture of any deposit " . . . ."

I leave open for further argument the question whether the plaintiff is now entitled to deal with the deposit as her own money without making any application to the Court under the Act.

The plaintiff, on the same day on which she issued her writ, also issued a summons under the Courts (Emergency Powers) Act, 1939, for leave to forfeit the deposit. I express no view on that summons at the moment, as I have given the defendant leave to file further evidence on it if he so desires, and have adjourned the summons into Chambers.

I decide only that the plaintiff was not bound to obtain the leave of the Court before sending to the defendant the notice of October 21, 1939, and that the notice was such a notice as is described in para. 23 (i.) of the General Conditions of Sale of 1934.

The defendant must pay the plaintiff's costs of the action.

Solicitors: *Soames, Edwards & Jones, for Joseph Lloyd & Co., Rhyl; Page, Moore & Page, for Freeland & Passey, Birmingham.*

F. C.

MORTON J.

1940 Oct. 22.

In re POINTER.

POINTER AND SHONFELD *v.* EDWARDS AND OTHERS.

[1940. P. 1128.]

Family provision—Daughter—Will of mother—Daughter married and under disability—Application for maintenance out of estate—Date of cesser of maintenance of daughter—Marriage or disability "whichever is the later"—Inheritance (Family Provision) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 45), *s.* 1, *sub-s.* 2 (*b*).

By s. 1, sub-s. 2 (*b*), of the Inheritance (Family Provision) Act, 1938: "The provision for maintenance" (i.e., under sub-s. 1) "to be made by an order shall . . . . be by way of periodical "payments of income, and the order shall provide for their "termination not later than . . . . (*b*) in the case of a daughter "who has not been married, or who is under disability, her "marriage or the cesser of her disability, whichever is the later":—

Held, that the words "whichever is the later" are apt in the case of a daughter who has not been married and is under a disability, but do not fit the case of a daughter who is—(*a*) married but under a disability or (*b*) unmarried but not under disability On its true construction the sub-section means that the allowance must cease, in case (*a*) when the disability ceases and in case (*b*) when the daughter marries.

ADJOURNED SUMMONS.

By this summons, Charles Benjamin Pointer (hereinafter mostly called "the husband") and Ada Ellen Shonfeld (hereinafter mostly called "the daughter"), who were respectively the widower and daughter of Alice Julia Pointer (hereinafter mostly called "the wife"), who died on December 7, 1939, asked that such reasonable provision as to the Court might seem fit subject to such conditions (if any) as the Court might impose should, under the Inheritance (Family Provision) Act, 1938, be made for them out of the wife's estate. The application was opposed by a granddaughter of the husband and wife.

The husband and wife married on November 24, 1883. They had two children—namely, the daughter, who was born on October 30, 1884, and a son, George Horace Pointer (hereinafter called "the son"), born on January 3, 1889. He died on February 22, 1919, leaving him surviving his wife, Ethel Annie Pointer, and a daughter, Joan Nancy Pointer (hereinafter called "the granddaughter"), both defendants to the summons. From the date of his death until the publication in the Press of a notice about the wife's estate, the husband allowed the granddaughter 1*l.* a month.

In or about 1893 the wife left the husband without warning and without reason, save that she had sometimes complained that he was "mean in money matters." The husband was then an elementary schoolmaster at a salary of 155*l.* a year. In 1905 they executed a separation deed, at the wife's request, the husband having the custody of and maintaining the children, and the wife having access to them once a month. The husband and wife never again lived together, although they met. From the time that she left him until about 1901, he gave her 1*l.* a week, despite his feeling that she had treated him badly, as she had, to his knowledge, no other means of living, and as he did not wish the mother of his children to suffer. In 1901, he ended these payments, having ascertained facts indicating other means of support.

The daughter, on leaving school, became a professional pianist, both performing and teaching. Also, she kept house for her father until, on June 24, 1908, she married Robert William Shonfeld. There were three children of the marriage. From the time that her husband went into the Army, in 1914, she worked as a pianist in cinematograph theatres. After the war, he returned to civil life. In 1928, she left him and, under a separation order, received 1*l.* 5*s.* a week for about six months, until he lost his position. The coming of talking films decreased her opportunities as a pianist and she became, in 1926, housekeeper to a friend of her father, receiving board and lodging, but not wages. Later, her hands became affected, and she had to relinquish piano playing. Osteoarthritis developed, and her medical adviser told her to give up both piano playing and heavy household duties. From the date of the separation from her husband, her father allowed her 5*s.* a week.

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About 1938, the wife, at her own request, went to live with the daughter and her employer. By her will, dated March 30, 1938, she appointed Charles Edwards, Stanley Cecil Theophilus, and Ethel Annie Pointer her executors and trustees. She bequeathed to the daughter 1000*l.* and all money to her credit in any deposit account with her bankers at her death. She directed her trustees to hold her residue in trust for the granddaughter absolutely should she attain the age of twenty-five years: should she not, then in trust for the granddaughter's child or children as therein mentioned; should no such child or children attain a vested interest, in trust for the daughter if alive when the trusts failed; and, if the daughter should not then be living, in trust for the daughter's child or children as therein mentioned. The will, with a codicil, dated October 13, 1938, and immaterial to this report, was proved on February 16, 1940. The total gross estate was 19,275*l.* 2*s.* 11*d.* The total "net estate," within the meaning of the Inheritance (Family Provision) Act, 1938, was, after deducting 1000*l.* for testamentary expenses, 15,849*l.* A notice in the Press relating to the will was the husband's first intimation of the size of the estate. He thereupon ended the allowance of 1*l.* a month which he had paid to the granddaughter since the son's death.

The evidence for the husband was that, at the date of the summons, he was eighty-three years old, living on a pension of 180*l.* 11*s.* 11*d.* a year, together with an income of 124*l.* 15*s.* 2*d.* a year from investments bought with his savings, and 25*l.* a year net from property, and that he was deaf and unable to earn money.

For the daughter, the evidence (other than the medical particulars hereinbefore stated and the evidence as to her allowance of 5*s.* a week) was that she was fifty-five years old, that none of her children could help her, that she understood that she was to receive a few shillings a week under her maternal grandmother's will, and that she had no means beyond the 5*s.* a week, her board and lodging, and the 1000*l.* (not yet paid to her at the date of this summons) under her mother's will.

Evidence for the granddaughter was that, save for what came to her under the wife's will, she had only clothes and personal belongings: that her health was bad, and that she had widespread rheumatism and suffered from nervous debility; and that she might improve, but for a long time would have no earning capacity of any significance. It was said that she was thus largely dependent on her mother, whose income was stated to be her pension of 159*l.* as the widow of the son, who had been an engineer sub-lieutenant in the Royal Naval Reserve.

F. C. Watmough for the plaintiffs. It is proved to the hilt that this gentleman treated his wife with very great generosity. He was left in a very difficult position, without any reason, with two young children to bring up. The Court will take that into consideration: see s. 1, sub-s. 6, of the Act. (1)

With regard to the daughter, the Court must be satisfied that, by reason of some physical disability, she is incapable of maintaining herself. That is shown by her doctor's evidence.

[MORTON J. I think that it is clearly shown—(*a*) that she cannot at present carry on as a musician, and (*b*) that she cannot do heavy household duties.]

I suggest that 2*l.* a week, or the income of one-fifth of the net residue, whichever is the smaller, is " reasonable provision " for her, within the meaning of the sub-section.

F. S. Laskey for the trustees.

H. B. Vaisey K.C. and *W. T. Elverston* for the granddaughter. The Act is not intended to enable the re-drafting of wills to suit the taste of the Court or of anyone else. The will in the present case is not comparable to a Roman

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(1) Sect. 1, sub-s. 6: " The " court shall, on any application " made under this Act, have " regard to any past, present or " future capital or income from " any source of the dependant of " the testator to whom the appli- " cation relates, ... and to " any other matter or thing which " in the circumstances of the case " the court may consider relevant " or material in relation to that " dependant, ... or other- " wise."

"testamentum inofficiosum." It cannot be said to disregard moral obligations that ought to be performed. The father has no case at all, and the daughter has a very weak one.

Watmough in reply.

MORTON J. This is an application by the widower and the only daughter of a testatrix, who died on December 7, 1939. The daughter is married, but her husband is not maintaining her, and it does not seem likely that he will ever maintain her. The particulars of the testatrix's estate are contained in paragraph 6 of a sworn statement and the estimated total "net estate"—within the meaning of the Inheritance (Family Provision) Act, 1938—is 15,849*l.* That is after deducting what seems to be a very generous estimate of 1000*l.* for testamentary expenses.

By her will, dated March 30, 1938, the testatrix appointed the first three defendants to be executors and trustees. By clause 3 she gave to her daughter, the plaintiff Ada Ellen Shonfield, "the sum of one thousand pounds and in "addition thereto all moneys standing to the credit of any "deposit account of mine with my bankers at the date of my "death . . . ." I pause there to say that there was standing to the credit of the deposit account at the date of the will, a sum which, on January 11, 1939, was just over 1000*l.*: but it was subsequently invested by the testatrix, so that nothing passed to the daughter under that particular gift. Then, after an immaterial provision, the will continues: "5. I devise and bequeath all the real and personal property "whatsoever of or to which I shall be seised possessed or "entitled at my death or over which I shall then have a "general power of appointment or disposition by will except "property otherwise disposed of by this my will or any "codicil hereto unto my trustees upon trust to sell call in "collect and convert into money the said real and personal "property at such time or times and in such manner as they "shall think fit with full power to postpone the sale calling "in or conversion of the whole of any part or parts of the "said property during such period as they shall think prope-

"and to retain the same or any part thereof in its present "form of investment without being responsible for loss. "6. My trustees shall out of the moneys to arise from the "sale calling in and conversion of my said property and all "other moneys forming part of my residuary estate pay my "funeral and testamentary expenses and debts and the "legacies given by this my will or any codicil hereto and "all death duties and other moneys which under or by virtue "of any direction or bequest free of duty contained in this "my will or any codicil hereto are payable out of my general "personal estate. 7. My trustees shall hold the residue of "such moneys and all parts of my estate for the time being "unsold (hereinafter referred to as 'my residuary estate') "upon trust for my grand-daughter Joan Nancy Pointer "absolutely if she shall attain the age of twenty five years "but if she shall not live to attain a vested interest therein "my trustees shall hold the same upon trust for all or any "the children or child of the said Joan Nancy Pointer living "at the date of death of the survivor of myself and the said "Joan Nancy Pointer who being male attain the age of "twenty one years or being female attain that age or "previously marry and if more than one in equal shares as "tenants in common. 8. If the said Joan Nancy Pointer "shall die under the age of twenty five years and no children "or child of hers shall attain a vested interest in my residuary "estate under the trusts hereinbefore declared my trustees "shall hold my residuary estate upon trust for my said "daughter Ada Ellen Shonfeld absolutely if she shall be "living at the date of the failure of the trusts hereinbefore "declared concerning my residuary estate but if she shall "not be then living then upon trust as to both capital and "income for all or any the children or child of my said "daughter living at the date of such failure as aforesaid "who being male attain the age of twenty one years or being "female attain that age or previously marry and if more "than one in equal shares as tenants in common."

The defendant Joan Nancy Pointer has attained the age of twenty-one years, but has not attained the age of twenty-five years. Of course, she is primarily the object of the testatrix's bounty under the terms of the will. Her mother, the third defendant, has an income stated in the evidence to be 159*l.* a year, but I think, in view of the facts stated by counsel at the hearing, that it is about 180*l.* a year. The defendant, Joan Nancy Pointer, does not enjoy at all good health, and there is medical evidence as to that.

This being an application under the Inheritance (Family Provision) Act, 1938, I have first to consider whether the two plaintiffs are respectively "dependants" within the meaning of the Act. There is no doubt that the husband comes within it, because he is expressly mentioned in s. 1, sub-s. 1 (*a*). The daughter, by virtue of the provisions of s. 1, sub-s. 1 (*b*), comes within the terms of the Act only if she has not been married (that is not the case with regard to this daughter), or "is, by reason of some mental or physical "disability, incapable of maintaining herself." The daughter is fifty-five years of age. She suffers from disabilities of health which now prevent her from carrying on her previous profession as a pianist, and she is unable to do heavy household duties. At the moment, she is employed as a housekeeper by a friend of her family, and she gets board and lodging and no wages.

I have no hestitation in finding that, in those circumstances, the daughter is, within the meaning of the Act, a person who, by reason of physical disability, is incapable of maintaining herself. It is true that she is getting board and lodging at the moment from this family friend for doing something within the household, but that is, of course, a precarious employment.

Both of these persons coming within the terms of the Act, the question is, does this will make reasonable provision for their maintenance? First of all, I shall consider the case of the daughter. I do not intend to state the facts of this case. They are all set out very clearly in the evidence, and I do not think it would serve any useful purpose to recapitulate them. I do not think that this will makes reasonable provision for the maintenance of the daughter. The daughter and the testatrix were, apparently, on perfectly good terms. In fact the testatrix lived in the same house with the daughter at the end of her life. I do not think that the legacy of 1000*l*. is, under all the circumstances, a reasonable provision for the maintenance of the daughter, although the daughter has a very small income of her own. Mr. Watmough has suggested that the reasonable provision, under all the circumstances, would be the income of one-fifth of the net residuary estate, or 2*l*. a week, whichever is the smaller sum. I think that is a not unreasonable suggestion, but, taking all the circumstances into account, I think that the maximum should be somewhat lower in the case of the daughter. I propose to order that the income of one-fifth of the net residuary estate, or the sum of 30*s*. a week, whichever is the smaller, shall be paid to her during her life, subject to the provisions of s. 1, sub-s. 2 (*b*), of the Act.

With regard to the widower, I have felt very considerable hesitation, but I feel that, in the circumstances, he having been deprived of the society of his wife since 1893, and they having remained on good terms, and having regard to his age, his physical infirmities and the scantiness of his means, it would be reasonable to make some small provision for him to assist him in his declining years. In his case, I propose to direct that the income of one-fifteenth of the residuary estate, or a sum of 5*s*. a week, whichever is the smaller, be paid to him during his life, subject as above.

Sect. 1, sub-s. 2, of the Act says " . . . . the order shall "provide for their termination not later than—(*a*) in the case "of a wife or husband, her or his re-marriage." The order must therefore provide that this 5*s*. will go to this old gentleman for life, or until re-marriage.

As to the daughter, the position is this. I have to ask myself, is this daughter either unmarried or under disability ? The answer is that she is. She is married, but she is under a disability. Then the Act says that the order shall provide for the termination of the payment of this income to her not later than her marriage or the cesser of her disability, whichever is the later. The words "whichever is the later" are apt in the case of a daughter who has not been married and is

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under a disability, but they do not seem to fit the case of a daughter who is—(*a*) married but under a disability, or (*b*) unmarried but not under a disability. I think the meaning of the sub-section must be this, that in case (*a*) the allowance must cease when the disability ceases, and in case (*b*) the allowance must cease when the daughter marries.

In the present case the allowance must cease upon the cesser of the daughter's physical disability. The Court may impose any condition it thinks fit under clause 1, and I shall impose a condition that the daughter shall inform the trustees if she receives at any one time a sum in excess of 200*l.* from any source.

The proper order as to costs is that the costs of all parties, as between solicitor and client, should come out of the residuary estate.

Solicitors: *R. A. W. Moylan-Jones; Soames, Edwards & Jones.*

K. R. A. H.

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Nov. 6, 7.

Revenue—Estate duty—Lunacy—Proceeds of sale of realty situate in New South Wales lodged in Court in England—Whether subject to estate duty—Residence in United Kingdom—" Ordinarily resident "—Lunacy Act, 1890 (53 *Vict. c.* 5), *s.* 123, *sub-s.* 1—*Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 2—*Finance* (*No.* 2) *Act,* 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 47.

By s. 123, sub-s. 1, of the Lunacy Act, 1890: " The lunatic, " his heirs, executors, administrators, next of kin, devisees, " legatees, and assigns, shall have the same interest in any moneys " arising from any sale, mortgage, or other disposition, under the " powers of this Act which may not have been applied under such " powers, as he or they would have had in the property the subject " of the sale, mortgage, or disposition, if no sale, mortgage, or " disposition, had been made, and the surplus moneys shall be " of the same nature as the property sold, mortgaged, or disposed " of."

The proceeds of sale of a share belonging to a person of unsound mind in certain real estate situate in New South Wales were remitted to this country and invested in 3½ per cent. war stock :—

Held, that, on the true construction of s. 123 of the Lunacy Act, 1890, the fund did not escape the estate duty levied by s. 2 of the Finance Act, 1894.

By s. 47 of the Finance (No. 2) Act, 1915: " The Treasury may, " if they think fit . . . . issue any securities which they have " power to issue . . . . with a condition that neither the capital " nor the interest thereof shall be liable to any taxation . . . . " so long as it is shown . . . . that the securities are in the " beneficial ownership of persons who are neither domiciled nor " ordinarily resident in the United Kingdom . . . . "

A person, domiciled in Australia, who came on a visit to this country in 1885, and shortly afterwards became of unsound mind, continued to live in England until her death fifty-four years later, remaining of unsound mind throughout that period.

Held, that she was " ordinarily resident " in the United Kingdom for the purposes of s. 47 of the Finance (No. 2) Act, 1915.

ADJOURNED SUMMONS.

A person, who was domiciled in Australia, came to England on a visit in 1885 and was in that year certified as of unsound mind. She remained in England fifty-four years until her death intestate in 1939. During the whole of that period she was of unsound mind.

In 1924 the Court authorized the receiver of her property to concur in the sale of certain real estate in New South

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Wales of which she was the owner of a half-share. The proceeds of sale were duly remitted to England and invested and were at her death represented by the sum of 16,451*l.* 17*s.* 9*d.* 3½ per cent. war stock.

A summons was taken out by her administrator (against whom a claim had been made by the Crown for the payment of death duties in respect of the fund) for the determination of the questions (1.) whether, upon the true construction of s. 123 of the Lunacy Act, 1890, and s. 2 of the Finance Act, 1894, the fund representing the proceeds of sale of the real estate in New South Wales sold pursuant to an order made under s. 120 of the Lunacy Act, 1890, was situate out of the United Kingdom for the purposes of liability to estate duty; and (2.) whether, in the events which had happened, the person of unsound mind was "ordinarily resident" in the United Kingdom for the purposes of s. 47 of the Finance (No. 2) Act, 1915.

Spens K.C. and *Jopling* (for *R. O. Wilberforce*, on war service) for the applicant. The fund is either personalty or it is, in the eyes of the law, realty still situate where the land was. It is difficult to see how the fund can be treated as realty for the purpose of deciding how it is to devolve on an intestacy, and yet it should be possible for the revenue authorities to come to the Court and say that it is none the less personalty and is thus liable to estate duty under s. 2, sub-s. 1, of the Finance Act, 1894.

This fund is not caught by that sub-section because, in the eyes of the law, it is situate out of the United Kingdom.

[They referred to *Attorney-General* v. *Marquis of Ailesbury* (1) and *Forbes* v. *Steven.* (2)]

Sect. 123 of the Lunacy Act, 1890, is absolutely general in its terms and the term " surplus moneys " is absolutely general.

J. H. Stamp for the Attorney-General. The fund is property in this country which has the incidence of Australian property. The Court, in the ordinary course of administration, has brought the proceeds of sale here. The artificial character of the property is only required for certain purposes. The property is here, and there is no difficulty in interpreting the section on that basis. "Situation" is something quite distinct from "character." The money was moved here by an entirely independent transaction. He referred to *Forbes* v. *Steven.* (1)

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(1) (1887) 12 App. Cas. 672.

(2) (1870) L. R. 10 Eq. 178.

Spens K.C. in reply. The powers of dealing with the property are given primarily for the benefit of the lunatic. That object is frustrated if the bringing of the property to this country is to be regarded as a separate transaction.

MORTON J. [after stating the facts, read s. 123, sub-s. 1, of the Lunacy Act, 1890, and continued :] I have already held, in a case which immediately preceded this case, that this lady was domiciled in Victoria, Australia, at the time of her death, and that the devolution of the 3½ per cent. war stock was to be the same as if the land in New South Wales had never been sold. The stock would therefore, devolve upon the persons who would have been entitled to the land in New South Wales if the land had not been sold.

The question which I now have to determine is whether this sum of 3½ per cent. war stock is property situate out of the United Kingdom within the meaning of sub-s. 2 of s. 2 of the Finance Act, 1894. There is no question that the investment comes within s. 2, sub-s. 1 (*a*), of the Finance Act, 1894, being property of which the deceased was, at the time of her death, competent to dispose: see the definition of this phrase in s. 22, sub-s. 2. Estate duty will not, however, be payable in respect of this property if it was situate out of the United Kingdom. Mr. Spens relies upon the provisions of s. 123, sub-s. 1, of the Lunacy Act, 1890, and he has also referred me to the somewhat contrasted language of sub-s. 2 of the same section. He says that the effect of that section is that I must treat this property, for fiscal purposes, as if it were land situate in New South Wales, and he relies in particular upon the concluding words of sub-s. 1: "and the surplus moneys shall be of

(1) L. R. 10 Eq. 178.

"the same nature as the property sold, mortgaged, or "disposed of."

I must start with this, that, in fact, the property in question was in this country at the date of the intestate's death. After giving careful consideration to the argument I cannot find that s. 123 of the Lunacy Act, 1890, gives the property any situation other than the situation which it in fact has.

Mr. Stamp, for the Crown, has pointed out that there were, in fact, two transactions carried out here by the Court. First, the Court directed the sale of the land in New South Wales, and, secondly, the Court directed that the money should be brought to this country, lodged in Court, and invested. He points out further that the Court might have thought fit to allow the money to remain in New South Wales, and he suggests that, if it had been allowed to remain there, it would have been subject to Australian duties and not to British duties. I think there is great force in that contention. I cannot find sufficient grounds in s. 123, sub-s. 1, of the Lunacy Act for transposing the position of the property notionally to New South Wales. I think that section is directed to provisions for the beneficial devolution of the property, and that it does not have the operation for which Mr. Spens contends. The property being situate in this country, I should have had to find, in some other Act, clear words transposing notionally its position to enable me to hold that it escaped the taxation which is levied by s. 2 of the Finance Act of 1894.

Mr. Spens has referred me to the speech of Lord Macnaghten in *Attorney-General* v. *Marquis of Ailesbury* (1), and also to the judgment of Sir W. M. James V.-C. in *Forbes* v. *Steven.* (2) In my view, the principles there laid down do not enable me to give, in the present case, a local situation to the property other than that which it in fact possesses. I think the matter really turns upon the construction of s. 123 of the Lunacy Act, 1890, and I cannot give it the far-reaching effect for which Mr. Spens contends.

(1) 12 App. Cas. 672, 687.

(2) L. R. 10 Eq. 178, 187.

Spens K.C. and *Jopling* for the applicant. A woman who visits this country, is forthwith certified, and remains here, a lunatic, for over fifty years does not come within the term "ordinarily resident." She must have a domicil, but she need not have had a residence anywhere. Although it may not be possible to contend that she was not resident in this country at the date of her death, she was undoubtedly not "ordinarily "resident."

They referred to *Inland Revenue Commissioners* v. *Lysaght.* (1) However long a prisoner of war is a prisoner of war in this country it cannot be said that he has at any time become a resident.

Stamp for the Attorney-General. A man in England who never has a roof over his head may reside in England. It could not be doubted that a tramp was an ordinary resident in England.

There is no authority on the question whether a person must have an ordinary residence or not.

A German prisoner of war has an ordinary residence in Germany and is taken away from that country by a misfortune of war—an extraordinary accident which does not disturb his residence.

The residence of this lady, which has been due to an accident, might not have resulted in a permanent residence. As a person of unsound mind she must have an ordinary residence.

Spens K.C. in reply referred to *In re Erskine.* (2)

MORTON J. The question which I now have to decide is this: Whether, in the events which have happened, the intestate was ordinarily resident in the United Kingdom for the purposes of s. 47 of the Finance (No. 2) Act, 1915. The way in which the question arises is this. Under the section to which I have just referred it is provided that: "The Treasury "may, if they think fit, during the continuance of the present "war and a period of twelve months thereafter, issue any "securities which they have power to issue for the purpose

(1) [1928] A. C. 234.

(2) (1893) 10 Times L. R. 32.

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"of raising any money or any loan with a condition that "neither the capital nor the interest thereof shall be liable "to any taxation, present or future, so long as it is shown "in manner directed by the Treasury that the securities are "in the beneficial ownership of persons who are neither "domiciled nor ordinarily resident in the United Kingdom, "and securities issued with such a condition shall be exempt "accordingly." The security in question in the present case is 16,451*l.* 17*s.* 9*d.* 3½ per cent. war stock, and it is common ground that this investment will attract duty if the intestate was either domiciled or ordinarily resident in the United Kingdom. I have already held, in the case which immediately preceded this case, that she was not domiciled in the United Kingdom, but in Australia, and I now have to decide whether she was ordinarily resident in the United Kingdom. I have not found it at all an easy question on which to arrive at a conclusion. I start with this, that, as was said by Lord Warrington of Clyffe in *Levene* v. *Inland Revenue Commissioners* (1), the word " resident " " has no technical or "special meaning for the purposes of the Income Tax Act. " ' Ordinarily resident ' also seems to me to have no such " technical or special meaning." I think these words must apply equally to the section which is relevant in the present case.

The facts in regard to this lady, which I have already stated in part, are that she was born at Maldon in the State of Victoria, Australia, on November 12, 1857, her father being a gentleman who resided there and became a magistrate there. He died on May 19, 1866. [After stating the facts, which showed that the lady came to visit England, with her mother and sister, in 1885 ; that four months afterwards she became of unsound mind ; and that until her death, fifty-four years later, she remained in England and did not recover, his Lordship continued :] At first sight it might seem strange if the Court were to hold that a lady who spent the last fifty-four years of her life continuously in this country was not ordinarily resident in the United Kingdom, but Mr. Spens and Mr. Jopling, for the applicant, suggest that she could not be

(1) [1928] A. C. 217, 232.

said to be ordinarily resident in September, 1885, when she was certified as of unsound mind, and that during the whole of the rest of her life she was under constraint, unable to exercise any will of her own. They submit that this period, the last fifty-four years of her life, cannot be taken into account at all as making her ordinarily resident in this country. They put the case of a prisoner of war who has come to this country and has been detained here, it might be for years. They say that he would not be ordinarily resident because the element of constraint is present. They also put the case of a foreigner with a home abroad, who comes to this country on a visit and commits some offence against the laws of the country, and is imprisoned for a considerable time, and ultimately dies in this country. They say he would not be held to be ordinarily resident, and they say that the same reasoning ought to apply to the case of this lady. They further rely upon certain observations of Viscount Sumner and Lord Buckmaster in *Inland Revenue Commissioners* v. *Lysaght*. (1) Viscount Sumner said this: "My Lords, the word "'ordinarily' may be taken first. The Act on the one hand "does not say 'usually' or 'most of the time' or 'exclusively' "or 'principally' nor does it say on the other hand "'occasionally' or 'exceptionally' or 'now and then,' though "in various sections it applies to the word 'resident,' with a "full sense of choice, adverbs like 'temporarily' and 'actually.' "I think the converse to 'ordinarily' is 'extraordinarily' "and that part of the regular order of a man's life, adopted "voluntarily and for settled purposes, is not 'extraordinary'." It is submitted for the plaintiff that the words of Viscount Sumner, "adopted voluntarily," indicate that no residence can be treated as ordinary residence unless that residence is the result of a voluntary act on the part of the person residing there. That the matter does not wholly depend upon choice is, I think, made clear by the speech of Lord Buckmaster, when he says: "It could not, I think, be denied that, even "although the respondent had his home in Ireland, his sojourn "in this country in the circumstances and for the purposes

(1) [1928] A. C. 234, 243, 248.

"found by the Commissioners might be so prolonged as to place "his residence here beyond dispute, but none the less I "understand the judgment of the Court of Appeal to mean this, "that they regard the object of his visits sufficient to show "that he could not be regarded as resident. They state that it "was not of his own free choice but in obedience to the "necessities of his position in relation to the company of "John Lysaght, Ld., that he was over here, from which it "would appear that the element of choice is regarded by the "Court of Appeal as a factor of great, if not of final, consequence "in determining residence. In my opinion this reasoning is "not sound. A man might well be compelled to reside here "completely against his will; the exigencies of business often "forbid the choice of residence, and though a man may make "his home elsewhere and stay in this country only because "business compels him, yet none the less, if the periods for "which and the conditions under which he stays are such "that they may be regarded as constituting residence, as in "my opinion they were in this case, it is open to the "Commissioners to find that in fact he does so reside, and if "residence be once established ordinarily resident means in "my opinion no more than that the residence is not casual "and uncertain but that the person held to reside does so "in the ordinary course of his life."

Although I think there is some force in the argument of Mr. Spens and Mr. Jopling, I do not think I can accede to it on the facts of the present case. This lady, when she was twenty-eight years old, came over to England with her mother, so far as we know, on a visit. There is no evidence as to how long they meant to stay. The evidence rather suggests, though it does not conclusively prove, that at that time the mother and daughters had been travelling since the father's death, and I do not know whether they still had a residence at Maldon, Victoria, or not. So far as the evidence shows, it would appear that the mother did not go back to reside in Australia after her daughter was certified, but spent some time in France and in Italy, and some time in England, but there again the evidence is not conclusive.

What happened was that the intestate, having stayed some four months in this country before she was certified, remained here as long as she lived. Her residence in England became permanent, no doubt, by reason of her mental condition and the fact that she required care and attention, but I think it may be fairly said that in the ordinary course of her life, as events happened, she resided in England. I think that one thing at least is clear. If, in the circumstances which I have described, she was not ordinarily resident in England during the last fifty-four years of her life, she was not ordinarily resident anywhere else. I enquired of counsel whether there had ever been any decision whether a man or a woman could be ordinarily resident nowhere, within the meaning of the Act which I have to construe, but I understand there has been no decision one way or the other.

Taking into account the whole of the circumstances of this case, I think I must arrive at the conclusion that the lady was ordinarily resident in England. I do not understand Viscount Sumner, in the passage which I have quoted, as saying that a period of residence in this country which is involuntary must be wholly disregarded for the purpose of ascertaining whether a person is ordinarily resident here or not. In my view it must not be left out of account that the intestate, having come to this country voluntarily at the age of twenty-eight, never left it. Whether I could have held that she was ordinarily resident in this country immediately before she was taken to a sanatorium I am not sure. In the light of *In re Erskine* (1) there might have been considerable doubt on that matter, but, having regard to the whole course of events, I think that she became ordinarily resident in this country before her death. In *Levene* v. *Inland Revenue Commissioners* (2) Viscount Cave L.C. said: "It remains to be considered whether "during the period in question the appellant 'ordinarily "'resided' in the United Kingdom for the purposes of s. 46 "of the Act," (that was an income tax case), "and I think "that there was material upon which the Commissioners

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(1) 10 Times L. R. 32.

(2) [1928] A. C. 217, 225.

"could answer this question in the affirmative. The suggestion "that in order to determine whether a man ordinarily resides "in this country you must count the days which he spends "here and those which he spends elsewhere, and that it is "only if in any year the former are more numerous than the "latter that he can be held to be ordinarily resident here, "appears to me to be without substance. The expression "'ordinary residence' is found in the Income Tax Act of "1806 and occurs again and again in the later Income Tax "Acts, where it is contrasted with usual (1) or occasional or "temporary residence; and I think it connotes residence "in a place with some degree of continuity and apart from "accidental or temporary absences." There can be no doubt that there was a very great degree of continuity in the present case.

With regard to the cases put by Mr. Spens and Mr. Jopling of the prisoner of war, or the prisoner incarcerated for some offence, such cases must be dealt with on their particular facts if and when they arise, but I can well imagine, taking the case of a prisoner of war, that, if a man had a permanent residence in Germany and came over here in an aeroplane to attack this country, and if he was captured and kept here for a considerable period, it might well be held that his ordinary residence was his home in Germany. However, as I have said, I do not propose to express any view upon hypothetical cases. Taking the case which is before me, I have arrived at the conclusion that the Crown's contention succeeds.

Solicitors: *Leman, Chapman & Harrison; Solicitor of Inland Revenue.*

(1) Quaere "casual".

J. L. D.

In re LASCELLES.

Ex parte THE TRUSTEE *v.* BLACK BROTHERS (FINANCIERS), LIMITED.

FARWELL
AND
MORTON
JJ.

1940
Oct. 28.

Moneylender—Bankruptcy—Proof of debt—Dividend—Rate of interest allowed—How calculated—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 66, *sub-ss.* 1, 2—*Moneylenders Act,* 1927 (17 & 18 *Geo.* 5, *c.* 21), *s.* 9, *sub-s.* 1.

A moneylender, when proving in bankruptcy for a debt due to him bearing interest, is not entitled to receive a dividend representing interest at a rate higher than 5 per cent. per annum on the principal until all other creditors in the bankruptcy have been paid in full. In calculating the amount which is to be admitted to rank for dividend in the first instance, any instalment of principal and interest paid by the debtor before the date of the receiving order, duly apportioned as between principal and interest, must be taken into account, and if it appears that at that date the creditor has already received more than 5 per cent. interest on the loan, his proof will be admitted to rank for principal but will only be admitted to rank for further interest when the other creditors have been fully paid.

Appeal from a decision of the judge of the Coventry County Court.

The debtor, the Hon. Mrs. Lascelles, on September 20, 1938, borrowed from the creditors, Black Brothers (Financiers), Ld., registered as a moneylender, the sum of 2000*l.* on a promissory note, bearing interest at the rate of 45 per cent. and repayable by quarterly instalments of 400*l.* and the balance on October 1, 1939. On the same date the debtor gave the creditors a charge over property by way of collateral security, afterwards treated by agreement as a charge for 500*l.*, of which 105*l.* 18*s.* 2*d.* was apportioned to interest. The debtor paid one instalment of 400*l.*, of which 59*l.* 11*s.* 6*d.* was appropriated to interest. On April 26, 1939, a receiving order was made against the debtor and on May 10, 1939, she died. On June 7 an order was made for the administration of her estate in bankruptcy.

On the creditors putting in a proof for the balance of the principal and interest due, the trustee admitted the proof for principal but refused to allow it to rank for any interest,

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on the ground that interest at a rate which considerably exceeded 5 per cent. had already been received by the creditors.

The learned judge held that the proof should be admitted to rank to dividend for interest on the balance of the principal due at the rate of 5 per cent. per annum from the date of the loan to the date of the receiving order. From this decision the trustee appealed.

The material sections of the Bankruptcy Act, 1914, and the Moneylenders Act, 1927, are set out in the judgment of the Court.

Levy K.C. and *G. F. Kingham* for the trustee in bankruptcy. The effect of the judge's order is to allow the creditors as much as 15 per cent. interest on their principal. Until all the other creditors are paid in full, a moneylender though he may prove for interest at any higher rate agreed on, can only receive a dividend on 5 per cent. interest: Bankruptcy Act, 1914, s. 66; Moneylenders Act, 1927, s. 9, sub-s. 2. See Halsbury's Laws of England, Hailsham edition, Bankruptcy, vol. ii., paras. 393 and 412. The creditors are entitled to a dividend on 1265*l.*, but all of this should rank for principal, and nothing for interest. Taking into consideration the first instalment of 400*l.* paid in respect of both principal and interest at the rate of 45 per cent., and the amount apportioned for interest in respect of the value of the security, the creditors have already received much more than the interest at the rate of 5 per cent., to a dividend on which they are entitled, but are not entitled to any further payment.

V. R. Aronson for the creditors. In my submission the decision of the learned judge was right. The appellant wants to read into s. 9 of the Moneylenders Act, 1927, words which are not there. Money paid between two solvent parties ought not to be taken into consideration in calculating the amount payable for interest. A debt due to a moneylender means a debt due to him at the date of the receiving order. The principal then due was 1265*l.* 9*s.* 8*d.* The creditors are entitled under the Moneylenders Act, 1927, to interest at the rate of 5 per cent. per annum on that sum down to the date of the receiving order. The trustee takes an estate as he finds it and has no right to reopen previous transactions between the parties.

MORTON J. delivered the following judgment of the Court. On September 20, 1938, the bankrupt, Mrs. Lascelles, now deceased, gave to Black Brothers (Financiers), Ld., registered moneylenders, a promissory note in the following terms: "I, the undersigned, promise to pay Black Brothers (Financiers), "Limited, or order"—then a place is specified—"the sum of "2000*l.* together with interest thereon at the rate of 45 per "cent. per annum by consecutive quarterly instalments of "400*l.* each and balance on October 1, 1939, until the whole "sum of principal and interest is paid, the first of such instalments to be due and payable on January 10, 1939. In case "of default in payment of any instalment or part thereof I, "the undersigned, promise to pay on demand the whole of "the balance of the said principal sum of 2000*l.* then outstanding, and due interest at the rate aforesaid to date of "such demand, together with simple interest on such balance "of principal and interest at the rate of 45 per cent. per "annum from the date of such demand until payment and "until such demand to continue to pay the said quarterly "instalments together with simple interest at the above rate "on the amount of any of the said instalments from due date "until payment, and all moneys paid on account of the said "advance and interest shall be applied, firstly, in payment "of the interest due and then to principal." On the same date she gave to Black Brothers (Financiers), Ld., a memorandum on the following terms: "In consideration of your "this day advancing me the sum of 2000*l.* on my promissory "note dated September 20, 1938, and in order to better secure "yourselves, I hereby charge to you by way of collateral "security all my interest in the trusts executed in my favour "by my late husband, the Hon. E. Lascelles." Those documents having been given and the sum of 2000*l.* having

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been advanced to the bankrupt, the first instalment of 400*l.* was paid not on January 10, 1939, when it became due, but on February 9, 1939. On April 26, 1939, before any further payment had been made, a receiving order was made against the debtor. On May 10, 1939, she died, and on June 7, 1939, an order was made for the administration of her estate in bankruptcy.

Questions arose as to the validity and effect of the document purporting to give a charge to the creditors, and ultimately there was a compromise between the trustee in bankruptcy and the creditors on the footing that the charge was to be regarded as a valid charge for 500*l.* I do not think that it is disputed between counsel appearing on this appeal that that 500*l.* should be treated as a payment of 500*l.* on account of the debt, made immediately before the receiving order. The creditors lodged a proof on April 19, 1940, and that proof is in the two-fold form which is usual, having regard to s. 66 of the Bankruptcy Act, 1914, and s. 9 of the Moneylenders Act, 1927. Sect. 66, sub-s. 1, of the Bankruptcy Act, 1914, provides: "Where a debt has been proved, and the debt "includes interest, or any pecuniary consideration in lieu of "interest, such interest or consideration shall, for the purposes "of dividend, be calculated at a rate not exceeding 5 per "centum per annum, without prejudice to the right of a "creditor to receive out of the estate any higher rate of interest "to which he may be entitled after all the debts proved in "the estate have been paid in full." It follows, therefore, that the debt may be proved for a larger amount than that which is admitted for dividend in the first instance.

That sub-section was slightly modified in the case of a moneylender by s. 9, sub-s. 1, of the Moneylenders Act, 1927, which states: "Where a debt due to a moneylender in respect "of a loan made by him after the commencement of this Act "includes interest, that interest shall, for the purposes of the "provisions of the Bankruptcy Act, 1914, relating to the "presentation of a bankruptcy petition, voting at meetings, "compositions and schemes of arrangement, and dividend, "be calculated at a rate not exceeding 5 per cent. per annum, "but nothing in the foregoing provision shall prejudice the right "of the creditor to receive out of the estate, after all the "debts proved in the estate have been paid in full, any higher "rate of interest to which he may be entitled. The provisions "of this sub-section shall, in relation to such a debt as afore-"said, have effect in substitution for the provisions of sub-"section 1 of section 66 of the Bankruptcy Act, 1914." The result of that sub-section is to apply in the case of a moneylender, so far as regards the question of dividend, the same provisions as appear in sub-s. 1 of s. 66 of the Bankruptcy Act, 1914; but it also applies the provisions to certain other matters, such as the presentation of a bankruptcy petition, voting at meetings, and so on.

Sub-s. 2 of s. 66, so far as material for the present case, states: "In dealing with the proof of the debt, the following "rules shall be observed . . . . (*b*) Any payments made "by the debtor to the creditor before the receiving order, "whether by way of bonus or otherwise, and any sums "received by the creditor before the receiving order "from the realization of any security for the debt, shall, "notwithstanding any agreement to the contrary, be appro-"priated to principal and interest in the proportion that the "principal bears to the sum payable as interest at the agreed "rate; (*c*) Where the debt due is secured and the security is "realized after the receiving order, or the value thereof is "assessed in the proof, the amount realized or assessed shall "be appropriated to the satisfaction of principal and interest "in the proportion that the principal bears to the sum payable "as interest at the agreed rate." There is nothing in the Moneylenders Act, 1927, which appears to modify or alter the provisions of that sub-section. Sub-s. 2 of s. 9 of the Moneylenders Act deals with procedural matters and with the supplying of certain particulars to the trustee when any proof is submitted by a moneylender.

On April 19, 1940, the creditors put in the proof to which I must now refer. It starts with September 20, 1938, with: "To amount of loan, principal 2000*l.*" It then includes interest from September 20, 1938, to February 9, 1939, at

45 per cent. per annum, which is 350*l.* 2*s.* 9*d.* It goes on to treat the payment of 400*l.* made on February 9, 1939, as being appropriated to principal and interest in the proportions of 340*l.* 8*s.* 6*d.* to principal and 59*l.* 11*s.* 6*d.* to interest. No question arises that that arithmetical calculation was correct and the payment of 400*l.* was so treated pursuant to the terms of s. 66, sub-s. 2 (*b*), of the Bankruptcy Act, 1914. The total amount of principal due then became 1659*l.* 11*s.* 6*d.* and the amount due for interest 290*l.* 11*s.* 3*d.* In the proof there is then put down interest from February 9, 1939, to April 26, 1939, the date of the receiving order, at 45 per cent. on the balance of the principal, which is 155*l.* 9*s.* 11*d.* That added to the sum of 290*l.* 11*s.* 3*d.* makes the interest 446*l.* 1*s.* 2*d.*, the principal due remaining at 1659*l.* 11*s.* 6*d.* The next item is: less agreed value of security, 500*l.*, apportioned as to 394*l.* 1*s.* 10*d.* to principal and 105*l.* 18*s.* 2*d.* to interest. That purports to have been done under the provisions of s. 66, sub-s. 2 (*c*), of the Bankruptcy Act, 1914, and it is not suggested that that appropriation is incorrect. The result was to bring out the balance of principal due at the date of the receiving order at 1265*l.* 9*s.* 8*d.* and the amount of interest at 340*l.* 3*s.*, making together a total of 1605*l.* 12*s.* 8*d.*

The way in which the trustee in bankruptcy dealt with the proof was as follows. He admitted the proof against the estate for the sum of 1605*l.* 12*s.* 8*d.*, but he marked it as having been allowed for the purpose of dividend at 1265*l.* 9*s.* 8*d.*, that being the amount stated in the proof to be due in respect of principal at the date of the receiving order, and postponed in respect of the sum of 340*l.* 3*s.* for interest pursuant to s. 66 of the Bankruptcy Act, 1914. The notice continues: "without "prejudice to your right to receive out of the estate such "postponed interest after all debts proved on the estate "have been paid in full." We understand that the footing on which the trustee took that view was this. He said, in effect: "The creditors have received on account of interest two sums, 59*l.* 11*s.* 6*d.* and 105*l.* 18*s.* 2*d.* These two sums taken together amount to interest on the debt at a higher rate than 5 per cent. That being so, the creditors cannot rank for dividend for anything at all in respect of interest." He allowed them, however, to rank for dividend in respect of capital for the full sum of 1265*l.* 9*s.* 8*d.*

The creditors appealed from that decision to the county court and the county court judge made an order as follows: "This Court doth order that the proof be admitted to rank "for the sum of 1605*l.* 12*s.* 8*d.* but for the purpose of dividend "only for the balance of principal—namely, the sum of "1265*l.* 9*s.* 8*d.*—and, in addition, interest on such unpaid "balance to date of receiving order at 5 per cent. per annum "—namely, one-ninth of 340*l.* 3*s.*, calculated at 45 per cent. "per annum shown on the said proof." We find it a little difficult to understand the concluding words beginning with the words "namely, one-ninth of 340*l.* 3*s.*," but whatever may be the precise meaning of that part of the order it is plain that the county court judge allowed the creditors to rank for dividend for 1265*l.* 9*s.* 8*d.* and interest to the date of the receiving order—we think it must be from the date when the 2000*l.* was advanced—at 5 per cent. per annum.

The debt in question in this case comes within the words of s. 9 of the Moneylenders Act, 1927. It is a debt due to a moneylender in respect of a loan made by him after the commencement of the Act and it includes interest. When the whole transaction is considered it appears that the moneylender has in fact received interest on the sum owed to him by the debtor at a rate exceeding 5 per cent. It seems to us that it cannot be the true construction of the section that, having received interest at a rate exceeding 5 per cent., the creditor should be entitled to receive a dividend in the first instance for any further sum of interest. We think the true view is this. Starting with the amount of the original advance, 2000*l.*, and taking into account the subsequent payments which have been properly treated as in part payment on account of principal and in part payment on account of interest, it will be found that the moneylender has received more than 5 per cent. on the money which passed from him to the debtor. In those circumstances we do not see how any further sum by way of interest can be allowed to rank

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for dividend. We think that the trustee in bankruptcy has treated the matter properly. He allowed the whole of the 1265*l.* 9*s.* 8*d.* to rank for dividend in respect of principal and we think that that was right. The two sums to be taken into account were properly apportioned under the Act and we see no reason why the amount for which the creditor could rank in respect of principal should have been reduced. On the other hand, so far as regards the claim for interest, the creditor having already received more than 5 per cent. interest, there is no further sum for which he can claim a dividend in respect of interest unless and until all the creditors in the bankruptcy have been paid in full. For these reasons we think that the appeal must be allowed.

I may add this. The figure of 1265*l.* 9*s.* 8*d.* was a figure which was ascertained as being the balance due for principal at the date of the receiving order, and there seems to be no good reason why 5 per cent. interest on that figure should be calculated right back to the time when the original 2000*l.* was advanced by the creditor to the debtor.

Appeal allowed.

Solicitors: *Woolfe & Woolfe; Alec Woolf & Turk.*

H. L. L.

In re SYLVESTER.

SYLVESTER *v.* PUBLIC TRUSTEE.

FARWELL J.

1940 Oct. 31.

[1940. S. 1939.]

Family provision—Husband—Small annuity bequeathed by wife—Application by husband for provision for his maintenance—Inheritance (Family Provision) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 45), *s.* 1.

A husband and wife were married in 1913 when he was forty-two years of age and he thereupon renounced his employment, assuming the whole care of the home, in which no servant was employed, and nursing his wife during illnesses. While she had independent means he had none and she defrayed all the household and living expenses. She died in 1940 bequeathing him an annuity of 52*l.* by her will, which also directed the payment of certain legacies and annuities to other persons and gave her residuary estate to certain charities. The husband claimed proper provision for his maintenance under the Inheritance (Family Provision) Act, 1938:—

Held, that, though such applications by husbands should not be readily entertained, the circumstances of the case were exceptional in that the husband late in life had no means but the annuity, the conditions of his married life having prevented him from providing for his old age and much prejudiced his chance of earning money in the future, and that proper provision for his maintenance would be 4*l.* a week.

ADJOURNED SUMMONS.

Milbourne Sylvester (hereinafter called "the husband") and Caroline Sylvester (hereinafter called "the wife") were married on November 5, 1913. The husband, who was forty-two years of age, renounced his previous occupation as manager of licensed premises and thereafter they lived together amicably. The wife having independent means, and the husband having none, she defrayed all the household and living expenses. The husband did all the work in the house, no servant being employed, and nursed the wife when she was ill.

The wife having made her will on October 19, 1939, died on February 24, 1940. She bequeathed certain legacies and left the rest of her estate on trust for sale and conversion, directing the proceeds to be employed as follows: "To pay "the following annuities (all duty free). To my sister the "said Laura Sophia Ellen Barry, an annuity of 104*l.* during "her life. To my brother Ernest Alfred Brigden an annuity "of 104*l.* during his life. Should my said brother die leaving "his wife Jessie Brigden him surviving then my executors "shall pay his annuity to the said Jessie Brigden during her "life. To my husband the said Milbourne Sylvester an annuity "of 52*l.* during his life. I direct my trustees to provide for "the said annuities by setting aside such portion of my "residuary estate as they shall consider sufficient and that "they shall not be at liberty to purchase any annuities. "The said annuities shall be paid weekly, the first payments "to be made within one week of my decease. I declare that "no annuitant shall be entitled to receive the capital value of "such annuity but only to receive the same as the payments "become due and that the same shall only be paid until the "respective annuitants in each case shall assign, mortgage "or otherwise encumber the said annuity or attempt to do so "and upon any such event happening the said annuity shall "cease." The wife then directed her residuary estate to be divided among certain charities. The estate, the net value of which was approximately 19,000*l.*, was amply sufficient to provide for the legacies and annuities bequeathed by the will.

The husband took out a summons under the Inheritance (Family Provision) Act, 1938, asking that reasonable provision should be made for his maintenance.

Droop (for *Mumford*, on war service) for the husband. This is an unusual case. After living for twenty-six years with his wife in reasonable comfort the husband finds himself late in life with only 52*l.* a year to support him under the terms of her will. The circumstances of his married life have virtually extinguished his chances of earning money in the future. Reasonable provision has not been made for him. If additional maintenance were allowed him no one would be prejudiced.

Roger Turnbull for the executor, the Public Trustee.

F. Baden Fuller for an institution interested in the residue. Reasonable provision has been made for the husband in the circumstances. An application by a husband should not be readily entertained.

FARWELL J. [having stated the facts:] I do not consider that in the ordinary way applications by husbands for this sort of assistance should readily be entertained. Prima facie a husband should be able to maintain himself, and ought not to ask the Court to give him, out of his wife's estate, more than she has thought fit to provide for him. There are, of course, exceptional cases in which such an application may be justified, but personally I should not be very willing to assist husbands in cases of this sort, unless the circumstances were indeed exceptional.

In the present case, however, I think the circumstances are somewhat exceptional. As appears from the evidence, the husband, up to the time of his marriage, was carrying on the business of managing licensed premises, for which, presumably, he was paid, so that out of his pay he must have kept himself. Had he continued in that occupation it may be that he would have been able by this time to have saved some money in order to make provision for his old age ; at any rate, he would not have been out of an occupation for many years, a circumstance which necessarily renders his getting a fresh one at this time of his life not an easy matter. He gave up his occupation and his earnings in order to devote himself to his wife. The lady seems to have kept no servants ; according to the evidence of the husband he did all the work of the house and generally looked after the affairs connected with it, and when his wife was ill, which happened on more than one occasion, he had to nurse her and look after her, she being unwilling to have the services of a nurse. Thus he seems to have had his time fully occupied, during the years of his married life, in running the home and looking after his wife. In that way he was prevented from earning his own living, or from making such provision for his old age as he might otherwise have done. Presumably the husband

and wife lived in reasonable comfort; the lady had sufficient income to enable them to do so, and now the husband suddenly finds himself, at the age of sixty-eight, with nothing to live on but the annuity of 1*l.* a week, and his chances of earning money in the future very much prejudiced, if not almost extinguished, by the conditions of his married life. In those circumstances he has some reason to feel that his wife has not made a reasonable provision for him. It is to be noticed that in the case of both the sister and the brother of the testatrix, the annuities provided for them are double that provided for the husband, and I think, on the whole, that this is a case in which the Court ought to make some reasonable provision for him in addition to the small annual sum which is provided by the will itself. Of course, any such provision can continue only during his widowhood, and can only be paid out of the income of the estate. None of the other annuitants will be thereby prejudiced in any way, as the estate is amply sufficient, and ultimately the charities will get the whole of the residue, although, if I make an order, their enjoyment of some part will be postponed till after the termination of the widowhood of the husband.

As I have said, the husband is given 52*l.* a year by the will and the evidence shows that after allowing for the other two annuities to be provided for, and for the other payments to be made, there is ample income, calculated in the way the Act directs, to enable that amount to be increased. On the whole, I have come to the conclusion that a reasonable provision for this man will be 4*l.* a week, including the 1*l.* a week which he gets under the will. Accordingly, I propose to make an order directing that out of the income there shall be paid to him during his widowhood an additional sum of 3*l.* a week free of duty. That will be subject to the provision against alienation contained in the will in respect of the original 52*l.* a year.

Solicitors: *Webster Butcher & Sons; Watson, Sons & Room; F. W. Hughes & Son.*

F. C.

MOSCROP *v.* LONDON PASSENGER TRANSPORT BOARD.

C. A.
1940
July 31;
Aug. 1;
Nov. 4.

[1939. M. 1565.]

Trade Union—Employee of public authority—Charge before divisional superintendent and appeal from decision — Employees given right to be represented by transport union official—Employee not a member—Whether condition placing him under disability—Trade Disputes and Trade Unions Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 22), *s.* 6.

It was a term of the employment of the plaintiff, an omnibus driver in the service of the defendants, a public authority, that drivers and conductors appearing before a divisional superintendent hearing charges of alleged breaches of discipline, or on appeal, might be accompanied by an official of a named transport trade union acting as advocate. On the hearing of an appeal by the plaintiff from a decision of a divisional superintendent, the defendants refused to allow him to be accompanied by an official of a different trade union from that to which he belonged, and since he was not a member of the union referred to in the terms of his employment, its officials would not have accompanied him :—

Held, that the defendants had committed a breach of s. 6 of the Trade Disputes and Trade Unions Act, 1927, by imposing a condition upon employees placing those who were not members of the Transport Union directly or indirectly under a disability or disadvantage in respect of appeals.

Per Scott L.J. Even if the condition complained of had been absent from the contract of employment so that there was no contractual condition contrary to the statute, and the plaintiff had simply been refused representation before the disciplinary board by an official of his own union on the ground that the Board would only allow representation by an officer of the Transport Union, that would be a breach of s. 6 of the Act.

Decision of Morton J. [1940] Ch. 755 reversed.

Appeal from Morton J. (1)

The facts of the case appear in the judgment of the Court and are fully set out in the report of the case in the Court below and may be briefly summarized as follows :—

The plaintiff had been employed as an omnibus driver by the defendant Board since its constitution under the London Passenger Transport Act, 1933. In 1937 an agreement was made between the Board and the Transport and General

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(1) [1940] Ch. 755.

Workers' Union, of which the plaintiff was then a member, which provided (inter alia) that drivers and conductors appearing before divisional superintendents or on appeal to the disciplinary board might be accompanied by an official of the union. This provision was thereafter a term of the plaintiff's employment.

He subsequently left the Transport Union, and in 1938 became a member of the newly formed National Passenger Workers' Union. In April, 1939, he appeared before the disciplinary board on an appeal brought by him against the decision of a divisional superintendent, and on that appeal was accompanied by the general secretary of the National Passenger Workers' Union to present his case. He was told, however, that he could not be represented by any one but an official of the Transport and General Workers' Union, and thereon abandoned his appeal.

In May, 1939, the plaintiff commenced an action against the defendant Board claiming " a declaration that the condition of the plaintiff's employment with the defendants "whereby the plaintiff is denied, as an appellant before the "defendants' disciplinary board, the advantage of representa-"tion by an official of his own trade union, while such "advantage is granted to or is the right of other servants of "the defendants who are members of another . . . . trade "union, is unlawful."

Morton J. dismissed the action, holding that there had been no contravention of the provisions of s. 6 of the Trade Disputes and Trade Unions Act, 1927. (1)

The plaintiff appealed.

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(1) By s. 6 of the Trade Disputes and Trade Unions Act, 1927: "(1.) It shall not be lawful for "any local or other public "authority to make it a condition "of the employment or con-"tinuance in employment of any "person that he shall or shall not "be a member of a trade union, "or to impose any condition upon "persons employed by the author-"ity whereby employees who are "or who are not members of a "trade union are liable to be "placed in any respect either "directly or indirectly under any "disability or disadvantage as "compared with other employees. "(2.) It shall not be lawful for "any local or other public "authority to make it a con-"dition of any contract made or "proposed to be made with the "authority, or of the consideration

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W. P. Spens K.C. and *R. Moelwyn Hughes* for the appellant. The appellant has been deprived of the right of representation by a representative of his union. The defendants have therefore unlawfully imposed on him a condition within s. 6, sub-s. 1, of the Trade Disputes and Trade Unions Act, 1927, and such a condition is rendered void by sub-s. 3 of that section. The right of representation is a valuable one and the defendants have produced a position in which a condition is imposed on a portion of the employees giving an advantage to another portion. The officials of the Transport Union will not represent an employee who is not a member of that union. It is no answer to this that it is open to all the employees to be members of the Transport Union, so that, as Morton J. thought, employees who refuse to belong to that union are penalizing themselves. There is a clear condition imposed to the disadvantage of employees who are not members of the Transport Union. The whole object of the section was to prevent any right being given to union or non-union men not given to non-union or union men as the case may be. The only authority in which the section has been considered is *Attorney-General* v. *Birkenhead Corporation* (1) and it is directly in the appellant's favour. It is suggested that the scope of the section is confined to cases of discrimination between union men and non-union men. On that view the present appeal would fail, as the appellant is a union man put at a disadvantage to members of another union. But the section has a wider meaning and is intended to prevent conditions arising among persons employed whereby some of them are put at a disadvantage to others of them. The words in s. 6, sub-s. 1: "who are or who are not members "of a trade union" should be used as if they were in brackets so that the condition legislated against is one "whereby "employees . . . . are liable to be placed . . . . under any "disability or disadvantage as compared with other

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"or acceptance of any tender "in connection with such a "contract, that any person to be "employed by any party to the "contract shall or shall not be a "member of a trade union. "(3.) Any condition imposed in "contravention of this section "shall be void . . . ."

(1) (1928) 93 J. P. 33.

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"employees". The condition here is really directed to making employees join a particular union and therefore it is directly within *Attorney-General* v. *Birkenhead Corporation.* (1) That there should be an advantage in belonging to a particular union is exactly the mischief that it was intended to put a stop to by the passing of s. 6. Employees who are not members of the Transport Union are put, in fact and in truth, at a disadvantage by the imposition of the condition.

The Court cannot take into consideration whether an employee, by his own volition, has lost the advantage of being a member of the Transport Union. The present condition of affairs is unlawful.

H. U. Willink K.C. and *H. E. Salt* for the respondents. The claim now made by the appellant is that the condition is void. That is of great importance to the Transport Union, which is not here. If the condition is to be struck out, all provisions made by the Board for representation of an employee by a third party are illegal. The scope and effect of s. 6 are quite clear, and are dealt with by Morton J. It prohibits pressure being imposed on an employee by a local or public authority. The giving of a liberty to an employee to be represented by a third party is not a " condition " within the meaning of the section. What the section prohibits must be strictly construed. It only refers to conditions imposed by the contract. There is no sense in avoiding a condition that is not contractual. In these cases there is a code as to disciplinary conduct: that differentiates them from the common law. The condition in question here gave the employee a right, which was an additional right to that given to the common law. For sub-s. 3 to apply there must be found something imposed. The absence of a right, which the employee is not entitled to, is not struck at by the section. The absence of a right to representation is not due to any condition, but to the absence in law of any such right.

Cur. adv. vult.

1940. Nov. 4. SCOTT L.J. In this appeal the appellant,

(1) 93 J. P. 33.

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to whom I shall refer as the plaintiff, is and was at all material times an omnibus driver in the employment of the respondent Board. He claims a declaration that the Board has been guilty of a breach of statutory duty under s. 6 of the Trade Disputes and Trade Unions Act, 1927; and asks for an injunction or liberty to apply. The facts are fully stated in the judgment of Morton J. and I only summarize them in order to bring out the legal issues.

The plaintiff was from 1928 till 1932 a driver in the service of the London General Omnibus Company. In the latter year the Board was created by Act of Parliament, took over the London omnibus system and the plaintiff passed into its service. In 1937 there was a strike of the Board's drivers, including the plaintiff, which was settled on new terms of employment negotiated with the Board by the Transport and General Workers' Union to which the Board's "platform "staff" (which included its drivers and conductors, and at that time the plaintiff) belonged. The terms are contained in the schedule to the memorandum of agreement dated June 15, 1937, referred to in the appeal as the "Brown Book." At that date there was no other trade union to which the Board's platform staff belonged; but in February, 1938, the plaintiff and others, who had become dissatisfied with the Transport and General Workers' Union, formed and joined a new union called the National Passenger Workers' Union. The plaintiff was still an effective member of the National Passenger Workers' Union at the time when the events happened which gave rise to the present proceedings, but had ceased to be in benefit in the Transport and General Workers' Union.

In February, 1939, the plaintiff was reported by an inspector of the Board for failing to pick up a would-be passenger. He appeared before the deputy superintendent and submitted that he had been in the right, but failed in his defence and was "cautioned." He then appealed, first to the divisional superintendent, who affirmed the deputy; and then to the disciplinary board. On April 18, 1939, he appeared before that board, accompanied for the purpose of representation on his appeal by the general secretary of his own union,

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but was told by persons acting with the authority of the Board that he could not be represented by anyone but the secretary of the Transport and General Workers' Union. Clause 3 of the schedule to the terms of employment in the Brown Book was as follows: "Drivers and conductors "appearing before a divisional superintendent or on appeal "may be accompanied by an official of the Union."

By definition the union meant the Transport and General Workers' Union. That sentence plainly imported the negative, namely, that an appellant had no right to be represented by anyone else. It was on this provision that the Board's refusal to allow an official of his own union to represent him was based. The learned judge found as a fact, and I agree with his finding, (1.) that no official of the Transport and General Workers' Union would have represented him, because he was not a member of it; although he added (2.) that if the plaintiff had appeared accompanied by an official of that union, the disciplinary board would have raised no objection. The evidence which was read to us, particularly that of the plaintiff and of the general manager of the operation side of the Board, satisfies me that the second finding is otiose; there was in truth no possibility of the plaintiff being represented by anyone from the Transport and General Workers' Union; the plaintiff had no choice between conducting his own appeal without the aid of any representation, or withdrawing his appeal. He chose the latter course.

The first, second and third sub-sections of s. 6 of the Act are as follows: [His Lordship read the section.] It was rightly conceded below and before us that the Board was a "public authority" within sub-s. 1.

On the above facts I am of opinion that the Board has in two respects committed breaches of the duty towards the appellant imposed on them by sub-s. 1. In 1932, when the Board took over from the London General Omnibus Company, the existing service agreements between that company and its platform staff already contained a term similar to that which I have quoted from the Board's Brown Book of 1937. This the Board repeated in its own contracts with the men;

whereas it ought to have realized the difference made by the Act in its own freedom of contract by reason of the fact that it was, whereas the company had not been, a public authority; and it ought therefore to have omitted the clause, which differentiated between members of the Transport and General Workers' Union and others. Non-union men may have been equally at a disadvantage under the company but the company had committed no offence; because it was not a public authority. When the Board took over, it came automatically under the statutory duty. However, the Board made no change either then or after the strike of 1937, or even in 1938, when the new union was formed. Then at least the Board was faced directly with the problem of inequality and ought to have realized that the men of the new union, whether previously they belonged to the Transport and General Workers' Union, or to no union, would certainly be "liable to be placed . . . . directly or indirectly"—through the operation of the Trade Union rules—"under a "disability or disadvantage" in respect of appeals as compared with men of the Transport and General Workers' Union. The Board ought forthwith to have informed the Transport and General Workers' Union that they had inadvertently committed a breach of the law; that they must eliminate the privileged position of that union, and make a general amendment of the representation clause in respect of appeals so as to extend equality of advantage alike to men of each union compared with those of the other and also to non-unionists. A similar consideration seems to apply to clause 12 of the conditions of employment on p. 13 of the Brown Book, in regard to medical examinations, which exposes men not in the Transport and General Workers' Union to a disability or disadvantage. But the Board adopted both clauses unaltered; and apparently did not even raise the matter with the Transport and General Workers' Union. The whole question of s. 6 of the Act probably escaped notice; but the maintenance of the representation clause as an integral condition of the contract of employment was and is, I think, a continuing breach of the statute.

There is, however, another angle from which the facts before us deserve consideration, but does not call for decision, because it was not definitely raised or argued. Let me suppose that the peccant term had been absent from the contract of employment, so that there had been in it no contractual condition contrary to the statute; but, nevertheless, that on the plaintiff's making his request to the disciplinary board for permission to be represented by the secretary of the National Passenger Workers' Union, he had been met with the answer (which was in fact made) that, whilst the Board would allow an official of the Transport and General Workers' Union to appear and represent him, they would not allow an official of the National Passenger Workers' Union to do so. Would not that conduct have involved a breach of the section? Would not the defendant Board have thereby "imposed a condition" on the plaintiff which was forbidden? I am disposed to think that the right answer would be in the affirmative; for the act of the Board on my hypothesis would have not merely exposed the plaintiff to a "disability or disadvantage," but actually and directly put him under a present disadvantage, as compared with what his position would have been, if he had been an effective member of the Transport and General Workers' Union, as indeed was shown by the plaintiff's own conduct. He recognized at once the fact of disadvantage, and abandoned his appeal, obviously because he did not feel able to stand up to the task of arguing his case alone without the advantage of skilled help.

The chief contention for the Board submitted to us by Mr. Willink was that the word "condition" in sub-s. 1 means a contractual condition, and nothing else; and that the scope of the sub-section is limited to conditions which actually form terms of the contract of employment, and are therefore capable of being "avoided" by sub-s. 3. Even as to the first half of sub-s. 1 I cannot accede wholly to that contention; for in that half, although the word is there used mainly in the sense of a term already part of a contract of employment, it would cover the making of a mere offer which, if and when accepted, would form such a contract; and also the making of a threat to terminate an actual contract of employment, containing no such condition, unless the employee would consent to vary its terms by agreeing to incorporate a condition of the kind prohibited. In these two cases it is the attempt to impose the condition by obtaining a contractual consent which would constitute the offence. In the second half of the sub-section, however, I can see no reason for construing the statutory prohibition as so limited to a contractual sense, whether strict or loose. On my hypothesis of the contract containing no contractual condition of the forbidden kind, what was the statutory position when the defendant Board announced their decision to the plaintiff, that he could not be represented by any Trade Union official outside the Transport and General Workers' Union? Surely that the Board was guilty of the forbidden act of "imposing "a condition which put him at a disadvantage, etc." And I cannot see that the presence of the condition in the contract makes that act any the less unlawful.

The word "condition" is, or at any rate was often in the past, used in English law as a synonym for "status," as applied to a person; and personal status or condition imports a bundle of rights and liabilities, powers and disabilities, advantages and disadvantages which attach to the particular status in question. In that wider sense the word is not inapt to cover such prejudicial effect upon the status of an employee in regard to his right of representation, as would necessarily result from the Board's intimation to the plaintiff on the occasion of his appeal. From the prohibition imported by the opening words of the section "It shall not be lawful," and the absence of any special procedure for the enforcement of the new statutory duties created by sub-s. 1 and sub-s. 2, it follows, in my opinion, that breaches of those sub-sections are indictable offences, the remedy afforded by sub-s. 3 being insufficient to exclude the ordinary rule of interpretation: see *Reg.* v. *Buchanan* (1) and *Osborne* v. *Milman* (2) per Lord Esher M.R. and Bowen L.J., and the analysis of the

(1) (1846) 8 Q. B. 883.

(2) (1887) 18 Q. B. D. 471, 474, 475.

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legal history of the rule by Charles J. in *Reg.* v. *Hall.* (1)

The essence of the section lies in its impartial neutrality of attitude in regard to trade unions, an attitude free from favour towards either members or non-members. It insists on simple equality of treatment; and its language is wide enough also to forbid any discrimination between one union and another. It is plain that Parliament intended the principle of equal treatment to be applied thoroughly; and that feature of the section affords an additional reason for construing the section as applying beyond the primary case of contractual conditions, and as embracing in its prohibition all conduct falling within the same mischief. I see no reason for limiting the prohibition of this section to merely contractual conditions any more than in the case of the prohibition of undue preference and its correlative unfair prejudice, contained in s. 2 of the Railway and Canal Traffic Act, 1854, where any conduct of the prohibited kind was aimed at by Parliament.

It was submitted for the respondent Board, though somewhat faintly, that there was no evidence in the present case of any such pre-existing claim of right and denial of it as was contended for the defendant Board to be essential to a declaratory judgment under Order xxv., r. 5. It is unnecessary to discuss that contention; for in the present case there was ample ground for treating the disputants as already ranged on opposite sides.

I have had the advantage of reading the judgment of Luxmoore L.J., in which Clauson L.J. concurs. So far as concerns what I have called the first breach of the section, I agree that the form of declaration which they suggest appropriately covers the insistence by the defendant Board on the unlawful condition contained in the written contract. On the other hand I still think that the section is not limited merely to conditions in a contract; and I should have been ready for the reasons I have given, if the plaintiff had asked for a second declaration, to have given it to him. The condition in the contract being unlawful and avoided by sub-s. 3, the Board was in the same position as if there had

(1) [1891] 1 Q. B. 747.

been no such term as there in fact was in the contract, and therefore as if they had merely volunteered the intimation "we give you leave to be represented by the secretary of "the Transport and General Workers' Union but we will "not allow anyone else to represent you." That would have been an act of unlawful differentiation to the prejudice of the plaintiff, constituting as I think an imposition of a "condition" contrary to the section.

My brethren, however, do not concur in that course, and the order of the Court will therefore only include the declaration as stated in their judgment.

The order of Morton J. will be discharged and I agree with the order my brethren propose as regards costs.

Clauson L.J. The judgment that Luxmoore L.J. is about to read is that of himself and myself.

Luxmoore L.J. The question involved in this appeal is whether the London Passenger Transport Board (hereinafter called "the Transport Board") has infringed the provisions of s. 6 of the Trade Unions Act, 1927. [His Lordship read the section.]

The Transport Board is admittedly a public authority and therefore subject to the provisions of the section. There is no doubt that the object of the section was to prevent any local or other public authority making it a condition that any of its employees should or should not be members of a trade union, or inducing any of such employees either directly or indirectly to become members of a trade union or cease to be members thereof. The section is obviously divisible into two parts, the first part relates to express conditions requiring membership or non-membership, while the second part relates to the direct or indirect inducement to become or cease to be members of a trade union. It seems to us plain that each part of the section covers the case of membership or non-membership of a particular trade union just as much as it covers the case of membership or non-membership of any unspecified trade union. Obviously under the second branch of the section any condition of employment which gives a particular employee any advantage over other employees dependent on membership or non-membership of a particular trade union or of any trade union may be a direct or indirect inducement to other employees to become or cease to be members of the particular union or of some trade union. In either case such condition would be contrary to the section and therefore void.

There is no dispute of fact in the present case. The facts material to be stated are as follows: the plaintiff who was and is a motor-omnibus driver entered the employment of the London General Omnibus Company (hereinafter called "the Omnibus Company") on April 12, 1928. A week or two after his employment by the Omnibus Company he joined the Transport and General Workers' Union (hereinafter called "the Transport Union"). The Omnibus Company was not a public authority and therefore s. 6 of the Trade Union Act, 1927, had no application to the plaintiff's agreement of employment but it was a term of that agreement that "appeals in respect of any disciplinary action shall be "heard weekly before a properly constituted disciplinary "board. Drivers and conductors attending such appeals "shall be allowed to be accompanied by a representative of "the union." The union referred to in this provision is the Transport Union. Until 1938 this was the only trade union concerned with motor-omnibus drivers and conductors. In 1933 the London Passenger Transport Board (hereinafter called "the Transport Board") was constituted under and by virtue of the London Passenger Transport Act, 1933, and the Omnibus Company was thereby incorporated in the Transport Board and ceased to exist as a separate entity. From that date the Transport Board became the employers of the plaintiff and other drivers and conductors of the Omnibus Company in succession to it. The terms of the plaintiff's employment remained unaltered and were the same as those in force with the Omnibus Company until June 15, 1937, when an agreement was made by the Transport Board and the Transport Union. This agreement resulted from the settlement of a strike of 'bus drivers and conductors which took place shortly before the agreement was made. The agreement was printed and circulated among all the employees of the London Transport Board in the form of a booklet which was referred to during the hearing of the appeal as the Brown Book. The agreement is entitled "Memorandum of agreement "between the London Passenger Transport Board and the "Transport and General Workers' Union as to rates of pay "and conditions of service. Drivers and conductors." It has been and is the basis of the employment of every employee of the Transport Board. The agreement comprises two parts. The first part relates to rates of pay while the second part relates to conditions of employment. In addition there is a schedule to the agreement which relates to various matters which may arise in the course of the employment of employees of the Transport Board. Clause 3 of this schedule relates to appeals and is in the following terms: "3. Appeals. Appeals "against depot superintendent's decisions shall be heard by "the divisional superintendent concerned. Divisional superintendents may also hear charges in the first instance, "according to the gravity of the charge. Appeals against the "decisions of the divisional superintendents shall be heard "weekly before a properly constituted disciplinary board. "There may be a final appeal to the general manager or his "representative. Drivers and conductors attending such "appeals shall be allowed to appear in plain clothes. Drivers "and conductors appearing before a divisional superintendent "or on appeal may be accompanied by an official of the "union. If the appeal succeeds, the appellant shall be entitled "to pay for the time lost." The union referred to in this clause is defined by the agreement to be the Transport Union.

The plaintiff after the strike continued his employment with the Transport Board and the provision as to appeals last referred to became a term of his employment. It is plain that the only representation permitted to an employee of the Transport Board under the provision as to appeals on any appeal to a divisional superintendent or to the disciplinary board is by an official of the Transport Union. It is admitted

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that no such official of the Transport Union would be allowed by that union to appear for any employee of the Transport Board who was not a member of the Transport Union or being a member thereof was not entitled to benefit under the rules of that union, i.e., was not more than six weeks in arrear with his subscriptions, and that consequently no employee of the Transport Board who being a member of the Transport Union was not entitled to benefit or not being a member of the Transport Union whether he was or was not a member of some other union could in fact obtain the benefit of representation at any appeal of the nature specified. This fact was admittedly known to the Transport Board and to every one concerned.

The plaintiff as already stated joined the Transport Union shortly after April 12, 1928, and he remained a member thereof until he ceased to pay his contributions thereto and in or before December, 1937, he ceased to be a member of the Transport Union. In February, 1938, the plaintiff joined the National Passenger Workers' Union (hereinafter called "the National Union") which had recently been formed. In February, 1939, a question arose whether the plaintiff had been guilty of some breach of duty. The matter came before the depot superintendent and the plaintiff was cautioned. The plaintiff appealed to the divisional superintendent who affirmed the decision of the depot superintendent and thereupon the plaintiff appealed to the disciplinary board. The hearing of this appeal was fixed for April 15, 1939, and the plaintiff presented himself on that day accompanied by the general secretary of the National Union, who was prepared to present the plaintiff's case and to represent him before the disciplinary board. The Transport Board refused to allow the secretary of the National Union to appear before it and in consequence the plaintiff declined to proceed with his appeal. On May 18, 1939, the plaintiff instituted this action against the Transport Board claiming a declaration that the condition of the plaintiff's employment with the Transport Board whereby the plaintiff is denied as an appellant before the defendants' disciplinary board the advantage of representation by an official of his own trade union, while such advantage is granted to or is the right of other servants of the defendants who are members of another and their own trade union, is unlawful. The plaintiff also claimed an injunction to restrain the defendants, their servants and agents from enforcing such a condition as aforesaid. The action was heard by Morton J. on May 8 and 9, 1940. He reserved judgment and delivered it on May 27, 1940. The learned judge held that the Transport Board's act in allowing its employees to appear on the specified appeals by an official of the Transport Union was not the imposition of a condition by the Board but was the grant by it of a privilege, presumably to all its employees. It is difficult to follow this argument, for although the Transport Board could not be compelled to allow any of its employees to be represented by some third person on disciplinary matters, yet if by purporting to allow representation in such matters to a particular class of persons who to the knowledge of the Transport Board would be bound to refuse to represent persons who were not members of the Transport Union, the Transport Board was in fact providing by its conditions of employment that some employees should be entitled to be represented on disciplinary appeals while others should not be so entitled. If this right of representation be termed a privilege it was one which was granted to a particular class of employee, namely, members of the Transport Union in benefit, and was not available to any other employees, namely, members of the Transport Union not in benefit, members of any other trade union and employees who were not members of any trade union. So far as the employees who cannot take advantage of the so-called privilege are concerned it is a condition of their employment that they cannot be represented at disciplinary appeals and they are consequently under a disability or disadvantage so far as their position is comparable to that of the employees who are members of the Transport Union in benefit. Further, it seems plain that if the Transport Board refused to allow a member of the Transport Union in benefit to appear before a disciplinary board by an official of the Transport Union, such refusal would constitute a breach of that member's terms or conditions of employment. The learned judge stated that it was, in his view, a misuse of language to call the provision with regard to representation at appeals a condition of service because in fact it conferred a privilege. The section speaks of the imposition of a condition on any persons employed by the authority whereby employees of a particular class are liable to be placed in any respect under any disability or disadvantage as compared with other employees. This provision must, we think, by necessary implication include its converse, namely, that the authority shall not impose any condition of employment whereby employees of a particular class are placed at an advantage as compared with other employees. It is to be observed that the provisions in the Brown Book as to appeals are to be found under the comprehensive title "conditions "of service." With all respect to the learned judge we are unable to appreciate how it can be said to be a misuse of language to refer to an advantageous term of service as a condition of employment. It seems to us that the judge has implied from the use of the word "impose" a limitation on the meaning of the term "conditions of employment" so as to exclude any condition which might be advantageous to an employee or to a particular class of employee. We see no reason for any such implication. The object of the section is, as we have already stated, to ensure that no public authority shall either directly or indirectly compel or induce any of its employees to become or remain a member or refrain from becoming or cease to be a member of any trade union. We think the phrase "impose any condition upon" has, having regard to the object of the section and the context in which it is found, no narrower meaning than "make it a condition "of employment." The difficulty of supporting the narrower construction became apparent when Mr. Willink on behalf of the Transport Board was driven to argue that the question of validity of any condition of the nature described in the section or implied therein must depend on the answer to the question: "Who suggested the incorporation of the condition "under consideration?" because if it was suggested by the Transport Union or by the employees or any of them it could not be said to be a condition imposed by the public authority; with this extraordinary result that if the condition had been suggested by the Transport Board it would be void, while if it had been suggested by any other body not being a public body, e.g., the Transport Union, or by any of the employees of the Transport Board, it would be valid.

The plaintiff by his writ and in his pleadings stated that the condition of which he complained is one whereby he is deprived "as an appellant before the defendant's disciplinary "board of the advantage of representation by an official of "his own trade union," and claimed in effect that a condition entitling him to be represented by an official of his own trade union on disciplinary appeals should be read into his own contract of employment in order to render valid the condition in favour of a member of the Transport Union in benefit conferred by clause 3 of the schedule to the agreement of June 15, 1937.

The learned judge asked himself the question when was such a condition as that claimed by the plaintiff imposed and came to the conclusion that the answer was "never." We respectively agree with that conclusion. Further, it seems to us that even if the condition which the plaintiff claimed should be read into his contract of employment was read into it, such condition would itself be contrary to the provisions of s. 6, because it would give an advantage to employees who are members of any trade union which would not be available to employees who are not members of any trade union. This was pointed out to counsel for the appellant at an early stage of the hearing of the appeal and he asked leave to amend the form of the declaration and there was considerable argument as to the form it should take. Since the hearing we have further considered the question of the form of declaration to which the plaintiff is entitled and we have come to the conclusion that he is entitled to a declaration "that the condition in regard to representation by an official "of the Transport Union imposed as part of the terms of "employment of employees of the Transport Board by the

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"provisions of clause 3 in the schedule to the memorandum "of agreement of June 15, 1937, implies upon its true construction that no employee unless he be a member of the "Transport Union shall be entitled to be represented on the "hearing of an appeal by any person, and that the said "condition is accordingly void by virtue of section 6 of the "Trade Disputes Act, 1927." This form of declaration seems to us to be unobjectionable because it places all employees whether members or not of any trade union including the members of the Transport Union whether in benefit or not on the same footing with regard to appeals in disciplinary matters. This declaration and the argument in support of it were not submitted to Morton J., and his mind was therefore not directed to what seems to us to be the substantial point in the case. For the reasons stated we think the plaintiff is entitled to have the order of Morton J., so far as it directs that the action should be dismissed, discharged and to have a declaration in the amended form previously stated in this judgment, with liberty to apply for the appropriate injunction if necessary.

Having regard to the late stage at which the point was raised we think the order as to costs in the Court below should stand and that there should be no costs of the appeal.

Before parting with the case we think it right to add that although there was no argument directed to the point it seems probable that there are other terms in the conditions of service set out in the Brown Book which infringe the provisions of s. 6 of the Trade Disputes Act, 1927, and are therefore void. For example the provisions in clause 12 (see Brown Book, p. 13) with regard to medical examinations appear to expose to disability or disadvantage men not members of the Transport Union in benefit.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Cole & Matthews; Solicitor for the defendant Board.*

H. C. G.

In re MAY'S WILL TRUSTS.

CROSSMAN J.

1940 Sept. 4.

MAY AND STANFORD *v.* BURCH AND OTHERS.

[1940. M. 1980.]

Trustee—Appointment—Original trustees—One in Belgium at date of German occupation—" Incapable of acting "—Meaning—No power in continuing trustees to appoint new trustee—Appointment by Court —Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 36, *sub-s.* 1; *s.* 41, *sub-s.* 1.

By s. 36, sub-s. 1, of the Trustee Act, 1925: " Where a trustee ". . . . desires to be discharged from . . . . the trusts . . . . "reposed in . . . . him, ... or is incapable of acting therein, ". . . . then, ... the . . . . continuing trustees or trustee ". . . . may, by writing, appoint one or more other persons . . . . "to be a trustee or trustees in the place of the trustee so . . . . "being incapable, ... as aforesaid."

By s. 41, sub-s. 1: " The court may, whenever it is expedient "to appoint a new trustee or new trustees, and it is found "inexpedient difficult or impracticable so to do without the "assistance of the court, make an order appointing a new trustee "or new trustees . . . ."

A testator's widow, who was one of the three trustees of his will, was in Belgium at the date of the German invasion and, so far as was known, at the date of this summons:—

Held, that the Court would not declare that the continuing trustees had power to appoint a new trustee in her place, would not lay down any rule, and would deal only with the particular case. There was no evidence that the widow was " incapable "of acting " within s. 36, sub-s. 1, but there was evidence showing that the proper course was for the Court to appoint a new trustee under s. 41, sub-s. 1.

ADJOURNED SUMMONS.

This summons was taken out by George Henry May and Frederick Stephen Stanford, two of the three trustees of the will, dated November 11, 1930, of Herbert James May, who died on August 7, 1937, to determine whether they had power, pursuant to the Trustee Act, 1925, to appoint a new trustee of the will in the place of the other trustee, Mrs. Marguerite Elvire Constance May, who was the testator's widow. The widow was living in Brussels at the date of the German invasion of Belgium and, so far as was known, was still in Belgium on June 19, 1940, the date of this summons. The defendants to the summons were Florence Louise Burch, Marguerite Laura Oates, and Violet Ethel Gemmell, who were sisters of the testator, and the widow.

The summons asked also (inter alia) that, if necessary, Frederick Edward Gordon Stanford, or some other fit and proper person, might be appointed a trustee of the will in the widow's place, that any necessary vesting orders might be made, and that service of the application on the widow might be dispensed with.

Danckwerts for the plaintiffs. The correct view is that the plaintiffs, as continuing trustees, are entitled in the circumstances to appoint a new trustee. There is no case on the point. The plaintiffs would have to come to the Court for a vesting order, and it has been thought best to come to it for a decision. [He referred to the Trading with the Enemy Act, 1939, s. 1, sub-s. 1, dealing with penalties for trading with the enemy, and s. 15 (the interpretation clause), and to *In re Lemann's Trusts.*] (1)

McMullen for the testator's sisters. Prima facie it is the duty of the testator's sisters to criticize the suggestion that the plaintiffs are entitled to appoint a new trustee. It is, however, quite obvious that there must be a new trustee. [He referred to Lewin on Trusts, 14th ed., p. 439, note (s), and to *In re Watts's Settlement* (2) on the meaning of "incapable."] All the direct authorities on the meaning of "incapable" are cases where a trustee has either become insane, or is physically incapable, by reason of infirmity or otherwise, of carrying out the duties of a trustee.

The point now before the Court is one which is exercising the minds of a great many trustees at the present time.

CROSSMAN J. I feel that there is some danger in declaring that the plaintiffs, as continuing trustees, have power, pursuant to the Trustee Act, 1925, to appoint a new trustee of the will in the place of the widow. Especially do I feel that there is

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(1) (1883) 22 Ch. D. 633.

(2) (1851) 9 Hare. 106.

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danger in laying down any rule, as a rule may well be susceptible of misuse. I cannot come to any conclusion covering more than this particular case. I can find no evidence that the lady is really "incapable of acting" within the meaning of s. 36, sub-s. 1.

The case seems to be one in which the right course is for the Court to appoint a new trustee. The evidence is enough to justify the Court's doing so under s. 41, sub-s. 1. Therefore, subject to the production of the proper affidavit of fitness, I will appoint the person whom the summons asks may be appointed to be a trustee in the place of the widow, and will make the necessary vesting orders. I will dispense with service of this application on the widow.

Solicitors for all represented parties: *Guillaume & Sons.*

K. R. A. H.

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Nov. 12.

In re WOOD'S APPLICATION.

[1940. W. 3906.]

Emergency legislation—Company—Debenture—Leave to debenture-holder to appoint receiver—Sale of property by receiver—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*) (ii.).

Where a debenture-holder has appointed a receiver, after first obtaining leave under the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2 (*a*) (ii.), and the company issuing the debenture is not in liquidation, no further leave is required to enable the receiver to sell the property subject to the charge.

In re S. Brown & Son (General Warehousemen), Ld. [1940] Ch. 961 considered.

When the court gives leave for the appointment of a receiver it has power under s. 1, sub-s. 4, of the Act to insert in the order, in a proper case, a restriction ensuring that he must come back to the court before selling the property.

PROCEDURE SUMMONS.

On November 18, 1937, the Globe Clothing Club, Ld. (hereinafter called "the company") issued a debenture in favour of Robert Dobson (hereinafter called "the debenture-"holder") to secure the sum of 1200*l.* and interest at the rate of 6 per cent. per annum. The principal sum was repayable on January 1, 1938, and was not repaid on that date.

By clause 3 of the debenture: "The company hereby charges "with such payments its undertaking and all its property "and assets, both present and future, including its uncalled "capital for the time being." By clause 4: "This debenture "is issued subject to and with the benefit of the conditions "endorsed hereon, which shall be deemed incorporated here-"with." By condition 11: "The holder of this debenture "may at any time after the principal moneys secured by "this debenture shall have become payable by any writing "under his hand appoint a receiver of the undertaking, "property and assets hereby charged (with powers for such "receiver, in addition to exercising the powers conferred by "the sections of the Law of Property Act, 1925, hereinafter "mentioned, to manage and carry on the business of the "company, to take possession of, get in and collect the "property and assets hereby charged, and to sell, convert "into money and realize the same, and to convey the property "sold in the name and on behalf of the company, for which "purpose the company irrevocably appoints every such "receiver its attorney) and may at any time in like manner "remove a receiver so appointed and appoint another in his "place with like powers. Any receiver so appointed shall so "far as the law allows be deemed to be the agent of the "company for all purposes and the holder of this debenture "shall not be under any liability for his remuneration or "otherwise. All moneys received by any such receiver shall, "after providing for the matters specified in the first three "paragraphs of s. 109, sub-s. 8, of the Law of Property Act, "1925, and subject to the provisions of that Act as to the "application of insurance money, be applied in or towards "satisfaction of the principal moneys and interest secured by "this debenture and subject as aforesaid be held in trust for "the company. The foregoing provisions shall take effect "by way of variation and extension of ss. 101 and 104 to "109 inclusive of the said Act, and the provisions of those "sections and the powers conferred on a mortgagee or receiver "by those sections as so varied and extended shall apply to "and be exercisable by any such receiver so far as applicable."

On December 9, 1939, the debenture-holder applied under the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2 (*a*) (ii.), for leave to exercise any remedy which might be available to him by way of the appointment of a receiver of the property comprised in the debenture and on December 21, 1939, leave was granted. On December 22, 1939, he appointed Benjamin Wood (hereinafter called " the receiver "). On October 10, 1940, the receiver applied under s. 1, sub-s. 2 (*a*) (iv.), of the Act for leave to exercise the rights and powers given to a receiver under the terms of the debenture to sell, convert into money, realize and convey the property and assets the subject of it. The company, which was not in liquidation, was made a respondent to the summons, but did not appear.

Winterbotham for the receiver. The leave of the court is sought because a receiver appointed in this way might be regarded as being, in effect, an attorney for the debenture-holder who desires to realize his security. The receiver is not an agent for the company in the sense that he can be controlled by it. He referred to *In re S. Brown & Son (General Warehousemen), Ld.* (1); *Gosling* v. *Gaskell* (2); and *Thomas* v. *Todd.* (3)

MORTON J. This summons raises a question of great importance under the Courts (Emergency Powers) Act, 1939, which may be stated as follows: Where a debenture-holder has appointed a receiver, having first obtained leave to do so under s. 1, sub-s. 2 (ii.), of the Act, and the company issuing the debenture is not in liquidation, is any further leave of the court required before the receiver can sell the property which is subject to the charge created by the debenture?

[His Lordship stated the facts, and continued:] By s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1939, so far as it is material: " Subject to the provisions of this Section "a person shall not be entitled, except with the leave of the "appropriate court, (*a*) to proceed to exercise any remedy "which is available to him by way of . . . . (iv.) the realisation "of any security." I have to determine whether a sale by the receiver of the property which is subject to the debenture comes within the provision which I have just read, and is accordingly an act which can only be done with the leave of the court.

In re S. Brown & Son (General Warehousemen), Ld. (1), decided by Bennett J., resembles the present case in every respect except one, namely, that there the company had gone into liquidation after the receivers and managers had been appointed by the debenture-holders with the leave of the Court. Bennett J. said this in the course of his judgment (4): "This is a summons under the Courts (Emergency Powers) "Act, 1939. It was originally issued by Mr. Charles Sherrott

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(1) [1940] Ch. 961.
(2) [1897] A. C. 575.
(3) [1926] 2 K. B. 511.
(4) [1940] Ch. 962.

"and Mr. William Henry Cork, the joint receivers and "managers of the property comprised in debentures issued "by the respondents, S. Brown & Son (General Warehousemen), "Ld. . . . . The relief sought is that Mr. Sherrott and "Mr. Cork, as joint receivers and managers, should be at "liberty to sell the property. . . . . Clause 11 of the debentures "provides: 'The holder or holders of this debenture may at "'any time after the principal moneys secured by this debenture shall have become payable . . . . appoint a receiver of "'the undertaking, property and assets hereby charged . . . .'" Then the learned judge quoted the powers conferred on the receiver by the debenture in question, which so far as they were quoted, were, I think, identical with those contained in the debenture before me. In particular they included the provision: "Any receiver so appointed shall so far as the "law allows be deemed to be the agent of the company for "all purposes . . . ." The learned judge then continued (1): "As I understand it, since the order of February 27, 1940, "was made, giving leave to exercise the remedy of appointing "a receiver, and since Mr. Sherrott and Mr. Cork were appointed, "the company has gone into voluntary liquidation. The result "of that is, according to *Gosling* v. *Gaskell* (2), to put an "end to the agency of the receivers quoad the company, "and the question now arises whether the receivers, when "they want to sell, should obtain the leave of the court under "the Courts (Emergency Powers) Act, 1939. The answer to "that question depends on the meaning of s. 1, sub-s. 2, of the "Act, having regard to the facts of the case." The learned judge then read the provisions which I have just read from that sub-section and continued (3): "In the present case, "if the company had not gone into liquidation and the receivers "were still the agents of the company, it might be difficult "to say that the receivers, seeking to exercise the powers "given by clause 11 of the debentures as the company's "agents, were proceeding to exercise any remedy available "to them." That is precisely the point which I now have to consider, and I am of course assisted by the observations of Bennett J. which I have just quoted. He continued: "But the position is quite different where, as in the present "case, the receivers, as the result of liquidation, have ceased "to be agents of the company, and are acting in co-operation "with the debenture-holders who appointed them. If, in "those circumstances, the receivers desire to realise the "property, they must then, in realising it, be acting as the "agents of the debenture-holders, and their act, in realising it, is "not their act, but that of the debenture-holders whose agents "they become. In those circumstances it is necessary for the "leave of the court to be obtained at the instance of the "debenture-holders whose agents the receivers must be "assumed to be." It may be that in the case before Bennett J. there were some special facts which led him to the conclusion that the relationship of principals and agents had arisen between the debenture-holders and the receivers, but if by that passage he was intimating that in his view the mere fact of the liquidation not only terminated the agency of the receivers quoad the company, but constituted them the agents of the debenture-holders, that is a matter which I should desire to consider very carefully before expressing my assent to it. However, I need not express any view upon that point, as in the case before me the company is not in liquidation.

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(1) [1940] Ch. 961, 963.

(2) [1897] A. C. 575.

(3) [1940] Ch. 961, 964.

Now, would the receiver, in selling the property which is subject to the debenture, be proceeding "to exercise any "remedy which is available to him by way of . . . . the "realisation of any security"? In my view clearly the receiver in his personal capacity is not doing any such thing, if these words are to be given their ordinary meaning. He is "deemed "to be the agent of the company," and he desires to sell this property, as I see the matter, in his capacity as such agent. It is equally clear, of course, that the company itself does not come within these words. It is not proceeding to exercise any remedy available to it by way of the realisation of a security, and it seems to me that if any one in the present case comes within the words of the sub-section it must be the debenture-holder. Now, is he proceeding to exercise any remedy which is available to him by way of the realization of a security? He is not before the court at all, and if he were so proceeding it would be necessary for him to apply for leave; but I have arrived at the conclusion that these words do not fit the case of the debenture-holder, by reason of the fact that under condition 11 of the debenture the receiver, when once he is appointed, is so far as the law allows to "be deemed the agent of the company for all "purposes." It is therefore the company's agent who desires to sell this property, and if he does so, it seems to me that the debenture-holder is not proceeding to exercise a remedy which is available to him by way of realization of any security. I recognize that this is a position which the Act may have been intended to cover. Further, this view involves the result that when once the debenture-holder has obtained the leave of the court to appoint a receiver the security may be realized without any further leave. This is, however, the conclusion to which I am driven by the words of the Act, in the circumstances of this case—circumstances which no doubt have occurred in the past, and will occur in the future over and over again.

I may add that although this point has never come directly before me for decision on any previous occasion, nor, so far as I am aware, has it come before any of my brethren, I have on occasion felt some doubt whether the appointment of a receiver in these circumstances by the debenture-holder might not have the result which I have just held it to have. It has accordingly been my practice, in cases coming within s. 1, sub-s. 4, of the Act, to give leave for the appointment of a receiver, when I thought the case was one in which leave should be granted, but, if I felt doubt whether the receiver ought to be allowed to realize the property without further application to the court, to insert a restriction which would ensure that he would have to come back to the court before selling. This the court has power to do in a proper case. The learned Master has referred me to my own decision *In the Matter of the Courts (Emergency Powers) Act,* 1939, *and In the*

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Matter of an Application by Trade Distributors, Ld., and In the Matter of a Debenture Created by New Era Furniture Industries, Ld. (1940. T. 331). In that case, on March 11, 1940, I ordered that the applicants should be at liberty to proceed to exercise any remedy which might be available to them by way of appointing a receiver of the property comprised in the debenture which they held, but I directed the following words to be added: "But so that the receiver "is not to be at liberty to realize the security created by or "subject to the said debenture without the leave of the Judge "in person, for which purpose the applicants are to be at "liberty to apply." It seems to me that even if, as a result of my decision, there would appear to be a gap in the Act, it can be filled, in a proper case, by coupling with the leave to appoint a receiver some such restriction as that which I have just read.

The result is that in my view the present application was not necessary. In those circumstances I think the proper order to make (and, indeed, Mr. Winterbotham could not contend the contrary) is to dismiss it, but I hope it has served a useful purpose by obtaining a decision upon a point which has very frequently occurred in practice.

I shall dismiss the application and preface my order with the expression of my opinion that in the circumstances no leave is necessary; and I shall add that if the respondent has incurred any costs the applicant must pay them.

Solicitors: *Austin J. Wright, for Herbert Duxbury, Bradford.*

F. C.

In re LINDSAY'S SETTLEMENT (No. 2).

FARWELL J.

1940 Dec. 18.

Settlement—Capital and income—Improvements—Reconditioning of cottages for servants, labourers, etc.—Works under Housing Acts—Repairs incidentally included in work done—Additions and alterations to buildings to enable same to be let—Not confined to structural additions and alterations—Expense to be borne by capital moneys—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 83; *Schedule III., Part* 1., *paras.* (xi.), (xxi.), (xxiii.); *Part* 2, *para.* (v.).

A local authority served notices upon the owner of a settled estate requiring a number of cottages thereon occupied by servants or labourers to be reconditioned and to have their drains connected with a main sewer. The work required was done, and a considerable part of it consisted of items, which taken singly and not as part of a comprehensive scheme were repairs which would be done at the cost of the tenant for life:—

Held, that the whole of the work which had been done could properly be said to be an "improvement" of the cottages for servants, labourers or artisans, and, being within s. 83 and paras. (xi.) and (xxi.) of Part 1 of the Third Schedule to the Settled Land Act, 1925, that all the expenditure thereon should be borne by capital.

The effect of the insertion in Part 2 of the Third Schedule to the Settled Land Act, 1925, of para. (v.), dealing with "structural "additions to or alterations in buildings reasonably required, "whether the buildings are intended to be let or not" is that the word "structural," not appearing before the words "additions "to or alterations in buildings reasonably necessary or proper to "enable the same to be let" in para. (xxiii.) of Part 1 of the Schedule is no longer to be read into the latter paragraph, and additions and alterations coming under the latter category are not necessarily limited to structural additions and alterations.

The decision in *In re Blagrave's Settled Estates* [1903] 1 Ch. 560, is no authority upon the interpretation of the Settled Land Act, 1925, Schedule III., Part 1, para. (xxiii.).

ADJOURNED SUMMONS.

Under a marriage settlement dated October 26, 1923, an estate known as "the Lindsay estate" at Shepperton was settled to the use of William Herbert Lindsay as tenant for life. There had been no issue of the marriage, and in default of issue, and subject to his wife's life interest if she survived him, the ultimate reversion was vested in Mr. Lindsay. A vesting deed was executed in favour of Mr. Lindsay in 1926.

There were a number of old cottages on the estate, some of which were occupied by persons employed upon it, which were in a poor condition. In 1936 and 1937 the Shepperton District Council served notices on the agent of the tenant for life requiring them to be connected with a new main sewer, and to be reconditioned, otherwise they would probably have been condemned as unfit for habitation. The work required was completed at a cost of about 5000*l.*, and included a number of items, which taken separately were properly repairs payable out of income. Another house belonging to the estate at Weybridge was unlet and to enable it to be let a number of alterations and additions were made in it, many of which were not of a structural character. The summons was taken out by the trustees to determine whether the expenditure upon the cottages at Shepperton and the house at Weybridge ought to be borne by capital or by income, or by capital in the first place and repaid by the tenant for life by instalments.

A. H. Droop for the trustees of the settlement. The word "improvement" in para. (xxii.) of Part 1 of the Third Schedule may have a wider meaning than in para. (xxi.) because the complete provision of small dwellings by improving existing dwellings is contemplated. But para. (xxii.) does not apply here as it includes only small dwellings which did not previously exist.

The decision in *In re Calverley's Settled Estates* (1) that s. 25 of the Settled Land Act, 1882, as amended by s. 74, sub-s. 1, of the Housing of the Working Classes Act, 1890, authorized improvements to existing working class dwellings is not applicable to para. (xxii.).

Unless "labourers" in para. (xi.) does not include "watermen," paras. (xi.) and (xxi.) apply, and I do not contend that "watermen" are not included.

The reconstruction or re-roofing of farm buildings does not cover repairs. The test is whether there has been renovation. The general principle of the former and the present Settled Land Acts on the question is stated by Lopes L.J. in *In re Tucker's Settled Estates* (2) to be, that what is usually done by a

(1) [1904] 1 Ch. 150. (2) [1895] 2 Ch. 468, 471.

man in occupation of premises are repairs to be done at the expense of the tenant for life. Only permanent improvements likely to benefit the remainderman more than the tenant for life should be paid for out of capital. Each case depends on its own circumstances.

The word "improvement" in para. (xxi.) does not exclude all repairs, but the test is the durability of the work: *In re Smith. Vincent* v. *Smith.* (1) Any work which might have to be done over again in a very few years time, such as painting or papering, is not an improvement or a reconstruction: *In re Farnham's Settlement.* (2) The surveyor should be asked to state which of the works not coming within other headings of Parts 1 and 2 of the Third Schedule might be expected to last, say, 25 years.

On the second point, as to the house "Fairview," all additions or alterations to it must be structural, if the cost is to be borne by capital. Any others must be paid for out of income. Para. (xxiii.) of Part 1 is the same as s. 13, sub-s. 2, of the Settled Land Act, 1890, and in that section it was held in *In re Blagrave's Settled Estates* (3) that additions or alterations must be structural. The word "structural" in para. (v.) of Part 2 is merely surplusage.

C. R. Romer K.C. and *M. O'Connell Stranders* for the tenant for life.

The cottages reconstructed were about one hundred years old and in a very poor condition. Work which was obviously reconstruction at the expense of capital had to be done at the same time as ordinary repairs, and ordinary decorative repairs such as papering or distempering and painting had to be done as a consequence of the reconstruction. The whole work of reconditioning cannot be divided up into repairs chargeable to income and improvement chargeable to capital. Much of the repairing and decorative work was properly speaking an "operation "incident to or necessary or proper" for the execution of the works, and accordingly is an improvement within s. 83.

Paras. (xi.) and (xxi.) of Part 1 of the Third Schedule are to be read together, in this case. The "works" included in

(1) [1930] 1 Ch. 88, 100, 101.
(2) [1904] 2 Ch. 561.
(3) [1903] 1 Ch. 560.

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para. (xxi.) include works whenever made, even before the date of the settlement: *In re Earl of Dunraven's Settled Estates* (1); *In re Calverley's Settled Estates.* (2)

These cottages, therefore, are within the paragraph, and the only question is, has there been an "improvement" of them thereunder. "Improvement" here cannot be restricted to its purely technical meaning.

On the second point, as to the house "Fairview," prima facie the improvements come within para. (xxiii.) of Part 1. The question is whether the word "structural" ought now to be read into the paragraph before "improvements." Buckley J., in *In re Clarke's Settlement* (3), decided that the improvements referred to in the corresponding paragraph in s. 13 of the Settled Land Act, 1890, must be confined to structural improvements, and that case was approved by the Court of Appeal in *In re Blagrave's Settled Estates.* (4) But para. (v.) of Part 2 of the Third Schedule to the Settled Land Act, 1925, is new and refers expressly to "structural improvements." The inference is that where the Legislature in that Act intended to refer to structural improvements, it said so expressly and where it does not mean to limit them to structural improvements, the word "structural" has been deliberately omitted. The Act has altered the law as laid down in *In re Blagrave's Settled Estates* (4), and the improvements and additions contemplated by para. (xxiii.) are not limited to purely structural improvements and additions. All the work done on this house therefore ought to be paid for out of capital moneys.

FARWELL J. This summons raises a question whether certain expenditure on several properties at Shepperton can properly be paid wholly out of capital moneys or whether the whole or any part of it ought to be borne by income, or whether it ought to be paid in the first place out of capital and repaid by instalments out of income.

The facts are these: under a settlement of October 26, 1923, Captain William Herbert Lindsay is tenant for life without impeachment for waste, and his wife, who is alive, has a jointure, but in the event of her out-living her husband she has a life interest in the settled property. Subject to that the property is to go to the children or issue of the marriage of Captain Lindsay and his present wife. If there are no issue, as there probably will not be, subject to the life interest of the widow if she survives, the property will go back to Captain Lindsay. Both Captain Lindsay and his wife are still alive, and there may be children of that marriage, though the probability is that there will not, because there has so far been no issue at all. But one cannot deal with this matter on the footing that Captain Lindsay will succeed to the estate, and quite rightly the trustees of the settlement have to do all they can to protect the inheritance should there be issue who may become entitled to the property. There is no one else to represent the unborn issue, it is therefore incumbent on the trustees not only to argue their case in this Court but, as they have done in the past, to see that in all the dealings with this estate in general, proper regard is paid to the interests of the unborn persons.

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(1) [1907] 2 Ch. 417.
(2) [1904] 1 Ch. 150.
(3) [1902] 2 Ch. 327.
(4) (1903) 1 Ch. 560.

This particular portion of the estate is at Shepperton and I think Captain Lindsay came into possession of the estate in 1926. After that date, a main drainage scheme for Shepperton was carried out by the local authority which, in 1936, served notices requiring certain old cottages on the property to be connected with the main drain, in lieu of the system of cesspools which then existed. The cottages in question were, I think, some one hundred years old, and had been built for, and were occupied by, either watermen or labourers, some of whom at any rate were employed on the estate. In 1937, as a result of the passing of the Housing Acts of 1935 and 1936, the local district council served on Captain Lindsay's agents several notices requiring works to be carried out to all the cottages. It is clear from the evidence that if the work required to be done by the notices had not been carried out, the cottages would have been condemned; so the possibility of pulling down those existing cottages and erecting new cottages for the tenants was considered by the tenant for life and his agents with the trustees of the settlement.

That would have been costly, and the tenant for life therefore decided, with the concurrence of the trustees, that the work required to connect the cottages to the main sewer and to comply with the notices under the Housing Act should be done. In the course of carrying out that work a number of defects were brought to light and had to be remedied, and in consequence each cottage was substantially improved. The amount ultimately spent on the cottages came to something like 5000*l.*, and the question is whether that expenditure can properly be charged against capital or not. That must depend on the section of the Settled Land Act of 1925.

It is desirable in the first place to look at s. 83. Sect. 83 provides that "Improvements authorised by this Act are "the making or execution on, or in connection with, and for "the benefit of settled land, of any of the works mentioned "in the Third Schedule to this Act, or of any works for "any of the purposes mentioned in that Schedule, and any "operation incident to or necessary or proper in the execution "of any of those works, or necessary or proper for carrying "into effect any of those purposes, or for securing the full "benefit of any of those works or purposes." The work which has been done has been very considerable indeed. In order to connect the cottages with the main sewer, it became necessary to do considerable drainage work in connection with the property. Up to that time they had had no drainage system other than by means of cesspools, and that could not remain because the district council were no longer prepared to deal with cesspools, so it became necessary that a new drainage system should be provided for these cottages. Further, the cottages, as I say, were built some one hundred years ago at a time when perhaps not so much consideration was paid to the housing of the poorer classes as it is to-day, and also at a time possibly when the requirements of the persons who were going to occupy the cottages in the first instance were not so great as they are at the present time. However that may be, it became necessary in the course of doing the work, to comply with the notices of the district council, among other things to put in a damp-course. The effect of doing that was in many cases seriously to affect the plaster of these old cottages, and in some cases the ceilings were injured. In the end a great deal of improvement became necessary and was in fact effected. As I have said, it resulted in very considerable improvement of the cottages but involved expenditure which, taken by itself and carefully analyzed and split up, would not be strictly included in the sort of expenditure which ought to be thrown on capital, but would be the sort of expenditure which would properly be borne by the tenant for life.

The word "improvement" in sub-clause (xxi.) of Part I of the Third Schedule to the Act does not, in my judgment, mean simply repairs. I am not going to attempt to define what the words "reconstruction, enlargement or improvement of any of those works" mean. It seems to me it would be not only very difficult, but most unwise for me to attempt to frame a general formula which could be applied to various cases as and when they arise. Each case must be dealt with on its own circumstances, and it seems to me impossible to do more than to pay regard to the word "improvements" as meaning, taken by itself, something which is more than an ordinary repair which a tenant for life does or an occupier of a dwelling-house or property habitually does from time to time in order to keep the place tidy, water-tight, and the rest of it.

I think, generally speaking, the word "improvements," as used in this sub-section, does necessarily involve, when taken by itself, something which is not repair within the ordinary meaning of that word; but it seems to me in a case of this sort, where there has been an improvement of the cottages to a large extent by making considerable alterations in the drainage works and in the actual structure itself, by the insertion of damp courses and things of that kind, it is impossible to split up the total expenditure and say: This particular item for papering the walls of this room cannot be an improvement within the Act, therefore it must be borne by the tenant for life. That no doubt is perfectly true if that is taken by itself, but when one is dealing with a case of this sort, in my judgment one has to consider the whole matter as one matter. This is a case where it became necessary to improve property for this particular class of persons, and in order to carry out that improvement it did become necessary not only to do certain things which could not be called repairs at all, but certain other things which might well be taken as repairs if dealt with individually, but as a whole they are all part of the essential work which was necessary in order to carry out the improvement. These trustees, I think with the best intention, have taken the trouble through their advisers to dissect to some extent the expenditure in this case. They put in one schedule a list of the expenditures which they think can properly be paid out of capital; and in a second list they have put various things which they say are doubtful, and in a third list they have put particular things which they say clearly ought to be paid out of income. As I said before (I am only repeating myself) if one had to deal with this matter piecemeal and had to consider the expenditure on things in the First Schedule by itself without reference to anything else, then to a great extent I have little doubt the trustees were quite right in saying those particular expenditures would in ordinary cases have been borne by income. But in my judgment that is not a reasonable and proper way of dealing with the matter, especially having regard to the actual language of s. 83. In this case the work which has been done has resulted in there being, on this estate, cottages for the labourers who are servants and artisans, whether on the settled estate or not, which are reasonably decent dwelling-houses for those particular persons, and in the result the improvement to the existing buildings has brought that about, and in order to bring about the improvement which has resulted, it became necessary to do all the works which they have in fact done. Therefore, not treating the matter piecemeal and considering each item separately, I think that when one looks at the whole matter and takes it from a broad point of view as a whole, it is probable that the whole of the work which in fact has been done, under proper supervision, can properly be said to be an improvement of the cottages for servants, labourers and artisans employed whether on the settled estate or not, and consequently the whole of this expenditure can properly be defrayed out of capital.

The second question I have to determine is whether para. (xxiii.) of the first part of the Third Schedule to the Settled Land Act, 1925, "Additions to or alterations in buildings "reasonably necessary or proper to enable the same to be let" is confined to structural additions or alterations, or whether it may be given a wider meaning. In connection with that, it is to be noticed that in para. (v.) of Part II., which follows almost immediately after that paragraph, there is this provision, "structural additions to" (these are "improvements, "the costs of which the trustees of the settlement or the "Court may require to be replaced by instalments") "or "alterations in buildings reasonably required, whether the "buildings are intended to be let or not, or are already let." I think having regard to that second provision, I should have very little doubt that the word "structural" was not intended to be read into para. (xxiii.), and I should have little doubt that when "additions to and alterations in buildings" were being referred to there, it was not confined to structural additions or alterations, but would include any reasonable and proper alterations and additions which were necessary to enable the property to be let.

But there are authorities which are undoubtedly binding on me under the former Settled Land Act, which held that "additions to or alterations in buildings reasonably necessary "or proper to enable the same to be let" must be read as confined to structural alterations. That appears from the decision of Buckley J. in *In re Clarke's Settlement* (1), which was upheld by the Court of Appeal in *In re Blagrave's Settled Estates*. (2) Therefore if this Act were in this connection the same as the earlier Act, I should feel myself bound, whatever my own view might be, to give effect to that decision, but in this Act para. (v.) which says "structural additions to or "alterations in buildings reasonably required" is new, and for the first time one gets, in this Act, the use of the word "structural" with reference to additions to or alterations in

(1) [1902] 2 Ch. 327.

(2) [1903] 1 Ch. 560.

buildings; and I think it is extremely significant that immediately preceding that part of the Act, where the Schedule deals with alterations to or additions in buildings reasonably necessary or proper, the word "structural" is not inserted. It may well be that when a tenant for life is desirous of making alterations in a building reasonably required, although he is not proposing to do it for the purpose of enabling the building to be let, those alterations or additions should be confined to that which is strictly structural, whereas where the tenant for life is desirous of making alterations or additions to enable a building to be let, there would seem to be less reason for limiting the extent of his powers in that case.

In the circumstances I have to construe not the Settled Land Act, 1890, but the Settled Land Act, 1925, and although in construing it I must have regard to the way the Court treated the words "additions to or alterations in "buildings" in the earlier Act, those are not decisions which bind me when I am dealing with another Act which contains other provisions; and in my judgment, whatever the view may have been as to the earlier Act, the fact that in this Act the word "structural" is inserted in this particular paragraph of Part II. and no such word is to be found in the earlier paragraph, the conclusion to which I feel bound to come (and I think it is a proper conclusion) is that the word "structural" was omitted purposely when this Act was drawn, and there is no justification for reading into this clause the word "structural" and that therefore in my judgment "additions to or alterations in buildings reasonably necessary "or proper to enable the same to be let" are not necessarily alterations and additions which are purely structural, they may include other additions and alterations as well. I will make a declaration in answer to para. 2, that the alterations and additions authorized in respect of "Fairview" are not confined to alterations and additions which are strictly structural, and give liberty to apply.

Solicitors: *Cohen & Cohen.*

H. L. L.

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Oct. 15, 16; Nov. 11.

In re GRIFFIN HOTEL COMPANY, LIMITED.

JOSHUA TETLEY AND SON, LIMITED *v.* THE COMPANY.

[1938. G. 2627.]

Company—Debenture—Floating charge over all assets—Appointment of receiver over part of property—Winding-up order—Judgment in debenture holders' action—Preferential debts—" Priority over any " floating charge "—Floating charge crystallized—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 78, 264.

A company possessing two hotels, one at Leeds and the other at Buxton, in November, 1937, issued a debenture creating a floating charge over all its assets to secure 45,000*l.* and interest. In December, 1938, an order was made in a debenture-holders' action against the company, appointing a receiver of all the company's property except the Buxton hotel, which was subject to a prior mortgage, and was of no value as a security to the debenture holders. In March, 1939, an order was made for the winding up of the company. Debts were incurred by the company in carrying on the Buxton hotel after the appointment of the receiver, some of which were preferential debts within s. 264 of the Companies Act, 1929:—

Held, that these debts, though ranking before those of the ordinary creditors of the company, were not entitled to any priority over the claims of the debenture holders to their security in the property over which the receiver was appointed, as when they were incurred the charge created by the debenture was no longer a " floating charge," having been crystallized by the appointment of the receiver, and therefore s. 264, sub-s. 4, had no operation. The priority existed only as to any other property subject to the charge.

SUMMONS in winding-up.

The following statement of facts is taken from the judgment of the learned judge.

This summons which raises a short question as to the construction and effect of ss. 78 and 264 of the Companies Act, 1929 (1), was issued by Joshua Tetley & Son, Ld., in a

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(1) Companies Act, 1929, s. 78: " Where, in the case of a " company registered in England, " either a receiver is appointed on " behalf of the holders of any " debentures of the company " secured by a floating charge, or " possession is taken by or on " behalf of those debenture " holders of any property com-" prised in or subject to the " charge, then, if the company is " not at the time in course of being " wound up, the debts which in

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debenture holders' action in which they are plaintiffs. The first defendants to the action, the Griffin Hotel Co., Ld.,

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" every winding-up are under the " provisions of Part V. of this Act " relating to preferential pay- " ments to be paid in priority to " all other debts, shall be paid out " of any assets coming to the " hands of the receiver or other " person taking possession as " aforesaid in priority to any " claim for principal or interest in " respect of the debentures. (2.) " The periods of time mentioned " in the said provisions of Part V. " of this Act shall be reckoned " from the date of the appoint- " ment of the receiver or of " possession being taken as afore- " said, as the case may be. (3.) " Any payments made under this " section shall be recouped as far " as may be out of the assets of " the company available for pay- " ment of general creditors."

Sect. 264, sub-s. 1: " In a winding " up there shall be paid in priority " to all other debts (*a*) All " parochial or other local rates " due from the company at the " relevant date . . . . (*b*) All wages " or salary (whether or not earned " wholly or in part by way of " commission) of any clerk or " servant in respect of services " rendered to the company during " four months next before the " relevant date, not exceeding " fifty pounds; (*c*) All wages of " any workman or labourer not " exceeding twenty-five pounds, " whether payable for time or for " piece work, in respect of services " rendered to the company during " two months next before the " relevant date." Then follows a proviso: " (*d*) Unless the company " is being wound up voluntarily " merely for the purposes of recon- " struction or of amalgamation with " another company, or unless the " company has at the commence- " ment of the winding up under such " a contract with insurers as is men- " tioned in section seven of the " Workmen's Compensation Act, " 1925, rights capable of being " transferred to and vested in the " workman, all amounts due in " respect of any compensation " or liability for compensation " under the said Act accrued " before the relevant date; (*e*) " Unless the company is being " wound up voluntarily merely " for the purposes of reconstruc- " tion or of amalgamation with " another company all amounts " due in respect of contributions " payable during the twelve " months next before the relevant " date by the company as the " employer of any persons under " either (i.) the National Health " Insurance Acts, 1924 to 1928; " or (ii.) the Widows', Orphans' and " Old Age Contributory Pensions " Act, 1925; or (iii.) the Un- " employment Insurance Acts, " 1920 to 1929." Sub-s. 4: " The " foregoing debts shall (*a*) rank " equally among themselves and " be paid in full, unless the assets " are insufficient to meet them, in " which case they shall abate in " equal proportions; and (*b*) in " the case of a company registered " in England, so far as the assets " of the company available for " payment of general creditors " are insufficient to meet them, " have priority over the claims of " holders of debentures under any " floating charge created by the " company, and be paid accord- " ingly out of any property " comprised in or subject to that " charge."

are the borrowers, who issued to the plaintiffs the debenture on which they sue, and are hereafter referred to as "the "borrowers." The second defendants, John Lupton & Sons, Ld., are incumbrancers of the borrowers, who have a charge on the borrowers' property ranking after the charge created by the debenture held by the plaintiffs. They are not interested in the questions raised by the summons.

The debenture held by the plaintiffs was issued to them by the borrowers on November 9, 1937, to secure repayment of a principal sum of 45,000*l.* and further advances with interest at the rate of 5*l.* per cent. per annum. Such debenture contains a charge by way of floating security on the undertaking of the borrowers and of their property whatsoever and wheresoever, both present and future, including uncalled capital. At the date when this debenture was issued the borrowers owned the freehold of certain licensed premises at Leeds known as the Griffin Hotel, where they carried on the business of hotel-keepers. By way of collateral security for the principal moneys and interest lent to them by the plaintiffs the borrowers, by a deed of mortgage dated November 9, 1937, specifically charged in favour of the plaintiffs those freehold premises. Subsequently, in 1938, the borrowers acquired for a term of twenty-one years from February 26, 1938, some leasehold premises at Buxton known as the Spa Plaza Hotel and Laundry, together with certain furniture, chattels, and effects. These premises, together with the goodwill of the business carried on by the borrowers thereon, became subject to the floating charge contained in the plaintiffs' said debenture; but by reason of consents given by the plaintiffs their floating security over such premises is subject to a mortgage dated September 19, 1938, created by the borrowers in favour of one Alfred Wright Dando.

The plaintiffs issued their writ on December 9, 1938, and on the same day they obtained ex parte an interim order for the appointment of Mr. Gerald Cater Veale as receiver and manager.

The terms of this order so far as material were as follows: "This Court doth hereby appoint until over December 12, 1938, "the said Gerald Cater Veale receiver on behalf of the plaintiffs "of all the property and assets of the defendants, the Griffin "Hotel Company Limited (except uncalled capital), comprised "in or subject to the charge created by the debenture dated "November 9, 1937, for 45,000*l.* and further moneys issued "by the said defendants and held by the plaintiffs except the "Spa Plaza Hotel, Buxton, and other premises comprised in or "charged by a mortgage dated September 14, 1938, and made "between said defendants of the one part and Alfred Wright "Dando of the other part and to manage business of the "company so far as carried on, upon, and with the premises "of which he is hereby appointed receiver."

The plaintiffs deliberately refrained from asking for the appointment of a receiver of the Spa Plaza Hotel and Laundry and the assets connected therewith because, having regard to the prior incumbrances in favour of Mr. Dando, such hotel, laundry and assets were of no value to them as a security. On December 13, 1938, an order was made in the action appointing Mr. Veale receiver and manager of the same property as that of which he had been appointed interim receiver and manager, the order being identical in terms with the order of December 9, except that Mr. Veale's appointment as receiver was without any limitation as to time and that the order contained the usual provisions as to the giving of security and a provision that Mr. Veale was not to act as manager after March 1, 1939, without the leave of the judge.

On March 15, 1939, an order was made by this Court for the winding-up of the borrowers. On July 10, 1939, the plaintiffs, on a motion for judgment obtained the usual judgment in a debenture-holders' action. That judgment, among other things, ordered an inquiry in the usual form whether there were any and what debts and liabilities of the borrowers which under ss. 78 and 264 of the Companies Act, 1929, were payable out of the property comprised in or subject to the floating charge created by the plaintiffs' debenture in priority to the moneys secured by the said debenture.

The certificate of the Registrar made in pursuance of the judgment, dated July 19, 1940, set out in the fourth schedule the debts and liabilities which under ss. 78 and 264 of the

Companies Act, 1929, were payable out of the property comprised in or subject to the floating charge created by the said debenture. The names of thirty creditors were contained in that schedule, each creditor's name being distinguished by a number. The Registrar stated at the foot of the schedule that debts due to creditors distinguished by the numbers 12 to 30 inclusive were incurred after the date of the appointment of the receiver and were outstanding at the date of the commencement of the winding-up of the borrowers.

In fact those debts were incurred by the borrowers in connection with the carrying on by them of the business of the Spa Plaza Hotel and laundry at Buxton exclusively. None of such debts was incurred in connection with the property of which a receiver was appointed on December 9, 1938.

The summons issued by the plaintiffs asked for the following relief: "For an order that the certificate of the Registrar "dated July 19, 1940, of the result of the accounts and "inquiries under the judgment in this action dated July 10, "1939, may be varied as follows, namely: by disallowing or "deleting the debts numbered 12 to 30 inclusive amounting "together to 385*l.* 0*s.* 6*d.* set out in the Fourth Schedule to "the said certificate which are thereby certified to be debts "and liabilities of the defendant company, the Griffin Hotel "Company, Limited, which under sections 78 and 264 of the "Companies Act, 1929, are payable out of the property "comprised in or subject to the floating charge created by "the debenture referred to in the said certificate in priority "to the moneys secured by such debenture."

Gordon Brown for the plaintiffs. At the date of the winding-up a receiver of the hotel at Leeds had been appointed, and there was no floating charge over the property in existence, therefore there was nothing to which s. 264 could be applied. The debts for which priority is claimed are entitled to priority over the ordinary creditors of the company, but not as against the debenture holders: see *In re Lewis Merthyr Consolidated Collieries, Ld.* (1), where it was held that where a receiver was appointed by a debenture holder whose security created both a fixed and a floating charge the priority given to preferential debts under s. 107 of the Companies (Consolidation) Act, 1908, applied only in respect of assets subject to the floating charge and not to assets subject to the fixed charge.

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(1) [1929] 1 Ch. 498.

J. A. Wolfe (for *Milner Holland*, on war service) for the defendants. These debts are payable in priority to the debenture debt of the company. The expression "any floating "charge" includes all floating charges originally created as such, whether or not they have subsequently crystallized. It refers to any charge created by the company as a floating charge. Sect. 78 refers back to s. 264 and preserves the priority of the debts mentioned therein as against any claim for principal or interest in respect of the debentures, after a receiver has been appointed.

Gordon Brown in reply. The relevant date is the date of the appointment of the receiver. The date of the creation of the charge cannot be looked at, ignoring all that has happened since then. The charge is no longer a floating charge.

Cur. adv. vult.

1940. Nov. 11. BENNETT J. [after stating the facts as above:] I do not think that the summons asks for the appropriate relief. The assets of which a receiver was appointed on December 9, 1938, either have produced or will produce moneys sufficient to enable the debts in question to be paid. The other assets of the borrowers, namely, the Spa Plaza Hotel and Laundry, will not produce any money.

The real point is whether the creditors whose debts are in question have a right to have their debts paid in priority to the plaintiffs out of the proceeds of sale of the assets of which the receiver was appointed on December 9, 1938. The plaintiffs do not object to an order giving the creditors in question a priority over any other assets of the borrowers, for there are none.

[His Lordship then read s. 264, sub-ss. 1, 4, and s. 78 of the Companies Act, 1929, and proceeded:]

On behalf of the respondents to the summons, the creditors whose debts are in question, it was argued that, if the order of events be first, the appointment of a receiver at the instance of a debenture holder of any property covered by a floating charge, and secondly, a winding-up of the company which issued the debenture, the operation of sub-s. 4 (*b*) of s. 264 is not excluded by the provision of s. 78 and that, if the company has incurred debts of the kind specified in sub-s. 1 of s. 264 after the date of the appointment of the receiver and before the date of the winding-up, those debts fall within the provisions of sub-s. 4 (*b*) of s. 264 and, by force of the clear language of the sub-section, "have priority over the claims "of holders of debentures under any floating charge created "by the company and shall be paid accordingly out of any "property comprised in or subject to that charge."

In my judgment, the argument advanced on behalf of the respondents is sound to this extent, namely, that the provisions of s. 78 do not exclude or prevent the operation of sub-s. 4 (*b*) of s. 264. There is, in my judgment, no language in the sections which excludes or prevents the operation of sub-s. 4 (*b*) in the supposed case.

But that conclusion on the construction and effect of the statutory provisions leaves open the question whether in the supposed events there is, when the winding up takes place, any floating charge or any property subject to that charge. In my judgment, sub-s. 4 (*b*) of s. 264 only operates if at the moment of the winding up there is still floating a charge created by the company and it only gives the preferential creditors a priority over the claims of the debenture holders in any property which at that moment of time is comprised in or subject to that charge.

In the present case the debenture held by the plaintiffs contained a floating charge over all the borrowers' property. On December 9, 1938, that charge ceased to float on the property and assets of which Mr. Veale was appointed receiver. The charge on that day crystallized and became fixed on that property and those assets. It remained a floating charge on any other assets of the borrowers. At the moment before the

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winding up order was made, the charge still floated over any other assets of the borrowers and over those other assets, if any, the preferential creditors as defined by sub-s. 1 of s. 264 have a priority over the claims of the plaintiffs by force of the provisions of sub-s. 4 of the same section. This seems to be a corollary of the proposition established by *In re Lewis Merthyr Consolidated Collieries, Ld.* (1)

I do not propose to make an order varying the certificate of the Registrar, for I think that his certificate is in accordance with the judgment and the provisions of the two sections of the Companies Act, but I propose to make the following declaration on this summons: Declare that the several creditors named in the fourth schedule to the certificate made in this action and filed on July 19, 1940, and therein respectively distinguished by the numbers 12 to 30 inclusive are not entitled to have their respective debts or any part thereof paid in priority to the claims of the plaintiffs in respect of their debenture dated November 9, 1937, out of any property or assets of the defendants, the Griffin Hotel Company, Limited, of which a receiver was appointed in this action on December 9, 1938, but that such creditors are entitled to have their debts paid in priority to the claims of the plaintiffs as aforesaid out of any other property of the said defendants comprised in and subject to the floating charge contained in the said debenture.

The costs of the respondents will be taxed as between party and party, and the receiver will pay them and be allowed them in the passing of his account.

Solicitors: *Maxwell, Batley & Co., for Simpson, Curtis & Co., Leeds; Corbin, Greener & Cook, for Bennett, Brooke Taylor & Co., Buxton.*

(1) [1929] 1 Ch. 498.

H. L. L.

GALBRAITH *v.* McKENNA.

SIMONDS
J.

1940
Nov. 5.

[1934. G. 2027.]

Practice—Judgment debtor—Order for examination as to means—Appointment made in 1935*—Non-attendance—Departure from jurisdiction—Further appointment on return in* 1940*—Leave of Court not obtained—R. S. C., Order* XLII., *r.* 32*—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 1.

An order having been made in 1935 under Order XLII., r. 32, for the examination of two judgment debtors as to their means, appointments were made which they did not attend. They left the jurisdiction and after their return in 1940 a fresh appointment was made though no leave had been obtained by the judgment creditors under the Courts (Emergency Powers) Act, 1939:—

Held, that the judgment creditors were proceeding "to "execution on, or otherwise to the enforcement of" the judgment within the meaning of s. 1, sub-s. 1, of the Act and that, although the judgment debtors had delayed the making of the appointment, leave should have been sought.

PROCEDURE SUMMONS.

On June 5, 1935, the plaintiffs, William Galbraith and James McKenna, recovered judgment against the defendants, Francis McKenna and Catherine McKenna, in the sum of 600*l*. On July 19, 1935, under the provisions of Order XLII., r. 32, it was ordered that the defendants should attend and be orally examined, before one of the examiners of the Court at such time and place as he might appoint, as to whether any and what debts were owing to them and whether they had any and what other property or means of satisfying the judgment. Two appointments were made under the order, but were not attended by the defendants, who left the jurisdiction. On September 26, 1940, after they had returned within the jurisdiction, a further appointment was made.

By a summons dated October 2, 1940, the defendants asked that all proceedings on the judgment, including the appointment for the examination, be stayed on the ground that no leave to proceed on it had been obtained pursuant to the provisions of the Courts (Emergency Powers) Act, 1939.

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Lightman for the applicants (the defendants). The making of an appointment under Order XLII., r. 32, is "in aid of "execution." Such a step requires the leave of the Court under s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1939.

Lloyd-Jones for the respondents (the plaintiffs). The order under Order XLII, r. 32, was made in 1935. But for the fact that the judgment debtors left the jurisdiction the appointment originally made would have been acted upon a long time before the Act came into force and the present appointment need not have been made at all.

SIMONDS J. [having stated the facts :] Order XLII. deals with execution, and r. 32, which is the first rule under the sub-heading " Discovery in aid of execution," is in these terms: "When a judgment or order is for the "recovery or payment of money, the party entitled to "enforce it may apply to the court or a judge for an order "that the debtor liable under such judgment or order, or, in "the case of a corporation, that any officer thereof, be orally "examined, as to whether any and what debts are owing to "the debtor, and whether the debtor has any and what other "property or means of satisfying the judgment or order, before "a judge or an officer of the court as the court or judge "shall appoint ; and the court or judge may make an order "for the attendance and the examination of such debtor, or of "any other person, and for the production of any books or "documents."

That is the jurisdiction and it is freely exercised, although it bears hardly on judgment debtors, submitting them to a searching cross-examination as to their property and means, and an order made in pursuance of it is, as described, "in aid "of execution."

I now turn to the provisions of the Courts (Emergency Powers) Act, 1939. By s. 1, sub-s. 1: "Subject to the "provisions of this section, a person shall not be entitled, except "with the leave of the appropriate court, to proceed to execution "on, or otherwise to the enforcement of, any judgment or order "of any court (whether given or made before or after the "commencement of this Act) for the payment or recovery of "a sum of money. . . . ." Those words are of the widest possible scope. I cannot construe the words "to proceed to execution "on, or otherwise to the enforcement of, any judgment or order "of any court" as meaning anything less than " take any step "in the direction of the execution or enforcement of the "order." They include, in my opinion, any step, whether it is one which has the immediate result of affecting the property of the judgment debtor or is in aid of the future taking of such a step. They cover any step which can legitimately be regarded as taken in the process or with the ultimate view of recovering a judgment debt. Accordingly it appears to me that I must regard a step which is taken under r. 32 of Order XLII., as being one which requires the leave of the court under the Act.

But it is said in effect on behalf of the judgment creditors: "The Act does not apply to what is proposed to be done here, "which is nothing more than the making of an appointment, "under an order obtained as long ago as 1935, which would "have been made effective long since but for the fact that the "judgment debtors evaded it by leaving the jurisdiction." I do not think that I can take that view of the section. It appears to me that where such an order has been made but has not been complied with for whatever reason, whether good or bad, the person entitled to the benefit of it is not entitled to proceed on it, if it be a step in the enforcement of his judgment, unless he obtain the leave of the court. I have inquired what the course of practice has been where, for instance, a writ of fi. fa. has been issued but not acted on before the Courts (Emergency Powers) Act, 1939, came into operation. On that I have been unable to get any assistance from the Bar, and nobody has provided the required information. But, however that may be, it appears to me that in a case of this kind, where an order has been made but has not been complied with, if the nature of that order is such that it is a step towards the enforcement of a judgment, then it should not be proceeded with until the necessary leave has been obtained. Accordingly

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I must give effect to this objection. But I think that in all the circumstances of the case the costs of the application should be reserved and should be dealt with if and when the leave of the court is sought under the Act.

Solicitors: *Harold Eves; Boxall & Boxall.*

F. C.

In re TWISS.

SIMONDS J.
1940
Nov. 21.

BARCLAYS BANK, LIMITED *v.* PRATT.

[1940. T. 2688.]

Will—Administration—Annuities free of income tax—Estate insufficient to provide income for payment—Valuation—Value and rate of tax applicable fixed as at date of order.

A testator by his will bequeathed two annuities free of duty and income tax, other deferred annuities not free of income tax, and a number of pecuniary legacies. Subject thereto the residue was bequeathed to charities. The net value of the residuary estate, after payment of funeral and testamentary expenses, debts and legacies was insufficient to provide for the two annuities given free of tax and leave any residue, but it was sufficient to pay the capital value of all the annuities, and leave a balance for the residuary legatees:—

Held, that in applying the rule as to valuation of annuities, the value must be ascertained as at the date of the order, and not the testator's death, and in the case of annuities payable free of tax, the rate of tax and the reliefs and exemptions must also be those prevailing at the date of the order.

ADJOURNED SUMMONS.

The testator, George Twiss, by his will dated October 7, 1936, appointed the plaintiff, Barclays Bank, Ld., to be executor and trustee thereof, and after making a specific devise of certain real, and a specific bequest of personal property, bequeathed annuities, free of all duties, deductions and income tax of 416*l.* each to Mrs. Amelia Annie Pratt and to Mrs. Jane Ann Barker, each annuity to commence from the testator's death, and to be paid by equal weekly payments of 8*l.* The testator then bequeathed certain reversionary annuities, but not free of duty or income tax, and pecuniary legacies amounting in all to 4500*l.* He devised his residuary real and personal estate to the plaintiff upon trust for sale and conversion and after payment or provision for his funeral and testamentary expenses and debts, and the annuities and pecuniary legacies thereby bequeathed and all duties arising on his death in respect of property specifically devised and bequeathed and in respect of the said annuities of 416*l.*, in trust as to one-sixth for the

National Society for Prevention of Cruelty to Children, one-sixth for St. Dunstan's, and the remaining two-thirds for Nazareth House, Home for Aged Poor and Orphan Children at Prestwich, near Manchester. The testator authorized the bank to appropriate or purchase investments to answer the annuities out of the annual income thereof.

The testator died on April 11, 1939, and probate of his will was granted to the plaintiff on June 15, 1939.

The estimated net value of the testator's estate after payment of debts, funeral and testamentary expenses and death duties (except legacy duty on sums paid for income tax on the annuities given free of tax) was 26,150*l.* After payment of the pecuniary legacies the amount available for satisfying the annuities, the legacy duty thereon, and the income tax on the two annuities given free of tax was 21,650*l.* The annual income of this amount was insufficient for the payment of the said two annuities. The plaintiff caused a valuation to be made by an actuary of the annuities payable under the testator's will, and their capital value was ascertained at 17,169*l.* Upon the income tax being increased from 7*s.* 6*d.* to 8*s.* 6*d.* in the pound, this value was increased to 18,403*l.* One annuitant whose annuity was not free of tax had died after the testator.

The summons, to which the beneficiaries were made respondents, was taken out to ascertain whether the plaintiff ought to pay the pecuniary legacies in full, and the annuities out of income as far as possible with power to resort to capital to make up the deficiency, or to value the annuities and to pay to the annuitants (except infants) the capital value of their respective annuities, and if the latter course were followed, to determine (1.) the date upon which such valuations ought to be made, and (2.) what rate of income tax ought to be taken into account for the purpose of valuing the annuities given free of tax.

B. G. Burnett-Hall (for *George Maddocks*) for the plaintiff.

R. A. Forrester for the annuitants entitled free of tax. The estate is not sufficient to provide for the payment of the annuities given free of income tax, and leave any residue, but it is actuarially solvent, so far as can at present be ascertained, and if the annuities are valued and the capital value paid to the annuitants there will be a balance for the residuary legatees.

The real question here is at what date ought the valuation to be made, and the rate of income tax for the annuities given free of tax determined. It is submitted that the rule is to value annuities as at the date of the order. That was done in one of the earliest cases *Todd* v. *Bielby* (1), a case where some of the annuitants had died since the death of the testator. Romilly M.R. said that the values of those which have expired must be fixed at what the annuitants would have actually received had the fund not been deficient, and the values of those which were still subsisting must be ascertained by adding the amount of the arrears actually accrued to the present value of the annuity. That case fixed the date of the order for the valuation of all subsisting annuities. The rule appears to have been departed from by Warrington J. in *In re Cottrell* (2) where the date of the testator's death was taken for the valuation, but in that case there was only one annuity, and there was no argument as to date.

[SIMONDS J. The question whether there is, or is not an actuarial deficiency, may not arise until years after the death, in due course of administration.]

The rule as to the date of the order was followed in *In re Ellis* (3) and *In re Cox* (4) and also in the recent decision in *In re Ball.* (5)

R. W. Goff for infant annuitants.

There appears to be some difference in the authorities. The decision in *In re Cox* (4) purported to follow that in *In re Cottrell* (2), but did not do so exactly, as in the former case the date of the order was fixed for valuation. The same date must be taken for valuation and for fixing the rate of income tax, and if the present rate of income tax is taken for valuing

(1) (1859) 27 Beav. 353.
(2) [1910] 1 Ch. 402.
(3) [1935] Ch. 193.
(4) [1938] Ch. 556.
(5) [1940] 4 All E. R. 245.

annuities given free of tax, the result may be that there will be insufficient estate to provide for the deferred annuities. The rule applicable depends on the question whether there has, or has not, been the lapse of a definite period since the death of the testator. If there has been, the date of the order is taken. But here the executor's year has only just elapsed, and the date of the death should be taken both for valuing the annuities and fixing the rate of income tax, which was then only 4*s*. 6*d*. in the pound: see *In re Metcalf* (1) and *In re Dempster*. (2)

A. Guest Mathews for residuary legatees.

The cases can all be reconciled on this basis, that where no annuitant has died since the testator's death it does not matter which date is fixed for valuation. But where an annuitant has died the Court cannot go behind his death, and antedate the order. Here both the annuitants whose annuities are given free of tax are still living. In *In re Ball* (3) it appears that before any steps had been taken at all one of the annuitants died, and in *In re Dempster* (2) the point did not matter, because all the annuitants were living. Where they are all living, the decision in *In re Cottrell* (4) should be applied and the valuation made as at the date of the testator's death.

Where a testator gives an annuity free of income tax his intention must be to free it from tax at the rate prevailing at the date of his death. Otherwise the rights of the parties would depend on the date when the trustees apply to the Court for directions. The only fixed point of time when the valuation should be made is the date of the testator's death.

Gilbert Dare for other residuary legatees.

The authorities can only be reconciled on the footing that the correct date for valuation is the date of death where the deficiency exists at that date, but that the Court will not value an annuity which has ceased to be payable before its order is made. If the date of the order is taken the beneficiaries may be left to the mercy of negligent trustees, or to any fraudulent claim which may hold up the administration of the estate.

(1) [1903] 2 Ch. 424.
(2) [1915] 1 Ch. 795.
(3) [1940] 4 All E. R. 245.
(4) [1910] 1 Ch. 402.

SIMONDS
J.

1940

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SIMONDS J. This case is governed for me by the decision of Farwell J. in the case of *In re Ball.* (1) There the learned judge states the general rule to be that the valuation of annuities, where they have to be valued, is to be made as at the date of the order. That is the rule laid down in earlier cases, see, e.g., *Todd* v. *Bielby* (2) and *In re Ellis* (3), and I must follow it in this case. It may operate hardly in some cases, as in the case of an annuitant who dies between the death of the testator and the date of the order, but it is a rule of general convenience which cannot be disregarded because in particular cases it appears to be less than fair either to an annuitant or to other interested parties. If there are cases in which a different rule has been applied they must, I think, be regarded as outside the current of authority.

Accordingly, the annuities must in this case be valued as at the date of the order and, for that purpose, the rate of income tax and the reliefs in respect of income tax which are prevailing at that date are to be taken into account. When those annuities have been so valued, then the legacies and the amounts representing the values of the annuities must be paid in full if the estate is sufficient and, if not, they must be abated pari passu. Some of the annuities are deferred annuities payable to infants, and it has been suggested on their behalf that the amount which would be payable to them if they were capable of giving a discharge should be retained by the trustees and invested in the purchase of a deferred annuity upon the terms of the will, and that such annuities should be retained by the trustees on their behalf. That seems to me to be a wise and prudent course to adopt on behalf of the infants.

Accordingly, I shall direct that the trustees do purchase on behalf of the infants deferred annuities of such value as the amount coming to them shall be sufficient to purchase, such annuities to be held upon the terms of the will. The exact words of the direction, I think, may want a little careful consideration and perhaps Mr. Goff would put it into proper form.

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(1) [1940] 4 All E. R. 245.
(2) 27 Beav. 353.
(3) [1935] Ch. 193.

The costs of all parties as between solicitor and client to come out of the estate.

Solicitors: *William Walker, Manchester; Torr & Co., for C. B. Hudson & Taylor, Rochdale; Ranger, Burton & Frost, for Wise & Wise, Manchester; Robbins, Olivey & Lake, for Wilding, Earley & Pegge, Manchester.*

H. L. L.

Considered. NOVELLO & CO. LTD. *v.* HINRICHSEN EDITION [1951] Ch. 1026

In re I. G. FARBENINDUSTRIE AKTIENGESELLSCHAFT'S AGREEMENT.

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Nov. 21, 22.

Alien—Enemy—Patent—German company on register—Bare trusteeship for British subject—Application for vesting order—"Assignment of "chose in action on behalf of enemy"—Trading with the Enemy Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *s.* 4, *sub-s.* 1. *Patents, Designs, Copyright and Trade Marks* (*Emergency*) *Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 107), *s.* 2, *sub-s.* 1.

By s. 4, sub-s. 1, of the Trading with the Enemy Act, 1939: "No assignment of a chose in action made by or on behalf of an "enemy shall, except with the sanction of the Treasury, be "effective so as to confer on any person any rights or remedies "in respect of the chose in action; . . . ."

By s. 2, sub-s. 1, of the Patents Designs, Copyright and Trade Marks (Emergency) Act, 1939: "Where, (*a*) an enemy or an "enemy subject is, or has at any time since the beginning of the "third day of September nineteen hundred and thirty-nine "been, whether alone or jointly with any other person, the "proprietor of a patent . . . . and (*b*) the comptroller is satisfied "that it is in the interest of all or any of His Majesty's subjects "that the rights conferred by the patent should be exercised . . . . "and that a person who is not an enemy or an enemy subject "desires to exercise the said rights . . . . and is in a position so "to do, the comptroller may, on the application of that person, "make an order granting to him a licence under the patent . . . . "either for the whole of the residue of the term of the patent, ... "or for such less period as the comptroller thinks fit":—

Held, that, where an enemy company is a bare trustee of a chose in action for a British subject (e.g., is on the register in respect of patents whereof the British subject is beneficial owner) an order of the Court vesting the chose in action in the British subject is not an "assignment of a chose in action made by or on behalf of an enemy" within the meaning of s. 4, sub-s. 1, of the Trading with the Enemy Act, 1939. Even if it could properly be described as an assignment of a chose in action, it would be an assignment made, not "on behalf of an enemy," but on the application of somebody, not an enemy, claiming a beneficial interest. The sub-section does not prevent a British owner of property vested for the time being in an enemy as bare trustee from seeking a vesting order without the sanction of the Treasury. The Court need not, in coming to that decision, decide also whether an assignment of a bare legal estate in a chose in action is or is not within the sub-section.

The existence of a state of war does not prevent the Court from investigating an alleged beneficial title, even to patents which have long been on the register in the name of an enemy. The Court will not say that, even if the beneficial title is proved, it will not make a vesting order in favour of the beneficial owner. The making of a vesting order will not affect the comptroller's power under s. 2, sub-s. 1, of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. The Court if satisfied of the beneficial title, will consider whether to make a vesting order or not: but it will not fetter its discretion to do so.

ADJOURNED SUMMONS.

By this summons Bayer Products, Ld., and Arthur Carpmael (hereinafter together called "the applicants") asked (inter alia) for an order vesting in Bayer Products, Ld., certain letters patent on the register in the name of I. G. Farbenindustrie Aktiengesellschaft, a German company out of the jurisdiction (hereinafter called " I. G.") and for rectification of the register.

Bayer Products, Ld., claimed title to the patents under an agreement made in 1926 between I. G. and Bayer Products, Ld., and a declaration of trust made by I. G. in favour of Bayer Products, Ld., in 1932, and alleged that I. G. was a bare trustee of the patents for Bayer Products, Ld. Other patents also were on the register in the joint names of I. G. and Arthur Carpmael.

Imperial Chemical Industries, Ld., were respondents to the summons, having been added in order to be able to assist the Court.

A letter written on behalf of the comptroller, in answer to one from the applicants' solicitors, stated that the comptroller did " not desire to offer any observations " on the application.

Charles Harman K.C. and *Gordon Brown* for the applicants.

Trevor Watson K.C. and *Lloyd-Jacob* for Imperial Chemical Industries, Ld. It is desired to take, on behalf of Imperial Chemical Industries, Ld., a preliminary objection under s. 4, sub-s. 1, of the Trading with the Enemy Act, 1939, namely, that the Court ought not to hear what is in substance an application to assign, by appointing some person or by some other legal procedure, patents at present in the name of an enemy alien, when the assignment will not confer on the assignee any rights in or remedies in respect of the patents. The making by the Court of a vesting order is an "assignment," for an assignment of some kind is needed to enforce it. In any case the vesting order which the Court is now asked to make would be, in a sense, an assignment on behalf of I. G. The Court would be acting to assert the right of Bayer Products, Ld., to call for an assignment under the agreement and declaration of trust. That is covered by the words "on behalf of" in the sub-section. The sanction of the Treasury for such an assignment has not been obtained, and the applicants' case depends entirely on their asking the Court to do, on behalf of I. G., the very thing which I. G. at the moment, cannot do for itself.

Charles Harman K.C. and *Gordon Brown.* If this objection were good, the result would be that, in every case, where a German in Germany was trustee of property in England to the benefit of which English beneficiaries were entitled, the English beneficiaries would be deprived, for the whole period of any war between England and Germany, of their interest in the property. That is ridiculous on the face of it.

Further, quite apart from the sanction of the Treasury, s. 4, sub-s. 1, of the Trading with the Enemy Act, 1939, has nothing whatever to do with this subject-matter. The Act deals with beneficial, not legal, interests, whereas, here, the applicants are not asking the Court to deal with the beneficial interest, which would not be changed by the order which is sought. The applicants' whole case is that these patents belong to Bayer Products, Ld.; all that I. G. has is the bare outstanding legal estate, or that which corresponds to it, namely, the registered title.

1939. Nov. 21. MORTON J. This is an application by Bayer Products Ld., of Africa House, Kingsway, and Arthur Carpmael, of 27, Southampton Buildings, for an order that under s. 51 of the Trustee Act, 1925, a vesting order may be made in respect of certain choses in action, namely, a large number of letters patent. The summons also asks that under s. 72 of the Patents and Designs Acts, 1907 to 1932, there may be rectification of the register of patents.

It is alleged by the applicants that Bayer Products, Ld., is beneficially entitled to the patents in question and that the party in whose name the patents at present stand—that is to say, as regards the large bulk of these patents, I. G. Farbenindustrie Aktiengesellschaft, a German company—is a bare trustee of the patents for Bayer Products, Ld.

At this stage, I have formed no view whether I. G. is or is not a bare trustee for Bayer Products, Ld. I must decide this preliminary point which I am about to state on the assumption that I. G. is such a bare trustee.

Mr. Trevor Watson has submitted that this application should be refused on the threshold by reason of the provisions of s. 4, sub-s. 1, of the Trading with the Enemy Act, 1939. The relevant part of that sub-section is as follows: "No "assignment of a chose in action made by or on behalf of an "enemy shall, except with the sanction of the Treasury, be "effective so as to confer on any person any rights or remedies "in respect of the chose in action ;" . . . . Mr. Trevor Watson's submission is that, if I make the order which is asked on this application, that will amount to an assignment of a chose in action made by or on behalf of an enemy, with the result that, as the sanction of the Treasury has not been obtained, such an assignment would not be effective so as to confer on Bayer Products, Ld., any rights or remedies in respect of the chose in action and he suggests that in these circumstances the Court will not make the order applied for.

In my view, it is not necessary for me to form any conclusion, in dealing with this preliminary objection, whether an assignment of a bare legal estate in a chose in action is or is not within the terms of that section, for, assuming that it is, and that the order sought on this application can properly be described as an " assignment of a chose in action," it would not be an assignment made by or on behalf of an enemy. It would be an assignment made on the application of a person claiming to be beneficially interested who is not an enemy.

It would, I think, be indeed strange if some British subject who owned property, vested at the moment in a German as a bare trustee for the British subject, were not entitled to ask the Court for a vesting order in respect of that property without first obtaining the sanction of the Treasury. I cannot believe that that is the effect of the section.

For these reasons I overrule the preliminary objection.

Trevor Watson K.C. and *Lloyd-Jacob* on the question whether the Court, in the exercise of its discretion, ought to make a vesting order.

Sect. 51 of the Trustee Act, 1925, provides (inter alia) that where a trustee entitled to a thing in action is out of the jurisdiction, the Court may make an order vesting the right to sue for or recover the thing in action in any such person as the Court may appoint. It is true that very little turns on the fact that the word "may" is used, not the word "shall": true, also, that intervention by a stranger in circumstances such as those of the present case is unusual, and that the matter comes to the Court simply for the investigation of title and, when once the facts are found, for the making of a vesting order, with hardly any question of discretion. It is to be remembered, however, that we are living in very unusual times, times in which the discretion of the Court, when exercisable, should embrace questions of general public policy.

In the present case, two facts are partly bound up with the question of title. First, Bayer Products, Ld., has not a factory of its own in this country. For many years, it merely marketed products coming from I. G. That appears from the evidence of Mr. Frederick Ambrose Stapleton Gwatkin, senior partner in the firm of McKenna & Co., the applicants' solicitors. Secondly, the comptroller, in exercise of the power conferred by s. 2, sub-s. 1, of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, has already granted compulsory licences in respect of a number of the patents to manufacture the articles concerned. There are also a large number of other licences, and with regard to one patent the

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comptroller has thought fit to grant a compulsory licence, despite opposition by Bayer Products, Ld., based on the very ground that Bayer Products, Ld., was capable of the whole manufacture in this country.

The manufacture in this country of the products which are the subject-matter of the patents in question is of the highest importance. Further, the Court ought closely to examine the motives of the applicants in seeking a vesting order.

If the Court makes the vesting order which is asked, the comptroller may be gravely embarrassed in the exercise of his jurisdiction, and the question may arise whether, having regard to the transfer of the patents on the register into the name of a British company, the comptroller has power to exercise the discretion conferred by s. 2, sub-s. 1. The Court, having regard to the inconvenience which would arise if it found that Bayer Products, Ld., was the beneficial owner, ought not to consider the question whether it is the beneficial owner or not. Even, however, if it does consider it, and finds, on the evidence, that Bayer Products, Ld., is the beneficial owner, still the Court ought not to make a vesting order. I.G. has been on the register in respect of these patents for many years.

The present is a highly inconvenient time at which to decide any such question of ownership.

Charles Harman K.C. and *Gordon Brown.* This objection is unprecedented and ought not to be entertained. It is not true that Bayer Products, Ld., is a mere marketing organization. Further, if these patents are the property of Bayer Products, Ld., Bayer Products, Ld., is not to be put on inquiry why it wants a vesting order in respect of them. If Bayer Products, Ld., is entitled to them, it is not for Imperial Chemical Industries, Ld., to oppose the making of a vesting order.

The beginning and the end of the whole opposition is that "public policy" is simply being invoked against a trading competitor.

Other things being proved to the Court's satisfaction, no reason advanced on behalf of Imperial Chemical Industries, Ld., is any real reason why the Court should not grant to the applicants the relief to which, in any other circumstances, a court of equity would say they were of course and, indeed, as of right, entitled. They are entitled to ask the Court to make, in the ordinary way, a vesting order on proof of the title of Bayer Products, Ld., and Bayer Products, Ld., comes within s. 51 of the Trustee Act, 1925. That being so, and Bayer Products, Ld., being entitled in the ordinary way, nothing has been disclosed in the evidence nor has anything been urged in the argument on behalf of Imperial Chemical Industries, Ld., which really has such a bearing as to make this a case out of the ordinary.

Nov. 22. MORTON J. For the sake of simplicity I propose at this stage to deal with this application as if it referred only to the patents specified in Part I. of the schedule to the summons, which are at the moment in the name of I. G. The other parts of the schedule contain comparatively few patents and I do not know whether different considerations will arise or not.

It has been argued by Mr. Trevor Watson for the respondents that, even if I am satisfied, on going into the evidence, that Bayer Products, Ld., is beneficially entitled to these patents and that I. G. is a bare trustee for the applicants, I should not make a vesting order. After some discussion, it was agreed that it would be convenient if I decided this general question before investigating the title of Bayer Products, Ld., to the numerous patents specified in Part I. of the schedule to the summons. Clearly, if I come to the conclusion that I should not make a vesting order in favour of Bayer Products, Ld., even if its title were proved, a great deal of time might be saved.

I should say at this juncture that Mr. Harman, for the applicants, submitted that counsel for Imperial Chemical Industries, Ld., had no right to be heard at all on this matter, as his clients had no beneficial interest whatever in the patents in question: but, on my intimating that I should desire the assistance of Mr. Trevor Watson on this matter, Mr. Harman raised no further objection to his being heard.

Mr. Trevor Watson submitted, first, that I should not inquire at all into the title of Bayer Products, Ld., to these patents. He says, and truly, that these are unusual times and points out that for a large number of years I. G. has been on the register in respect of these patents, and he suggests that now is not the time to investigate whether Bayer Products, Ld., is or is not the beneficial owner.

I cannot take that view. The object of keeping the Courts in being and discharging their usual functions during war-time is to determine the rights of litigants who come and seek to have their rights determined. In this case the applicants say: "Bayer Products, Ld., is the beneficial owner of "these patents: we desire to satisfy the Court of that and, "when we have satisfied the Court of that, we ask for a vesting "order and for rectification of the register of patents." I can find nothing in the facts of this case which should lead me to refuse to determine the question of the beneficial ownership of these patents. The applicants ought to have that question determined.

The further question then arises: Assuming that I find, on further investigating the facts, that there are certain patents, either some or the whole of those specified in Part I. of the schedule to the summons, whereof I. G. is a bare trustee for Bayer Products, Ld., ought I to make a vesting order?

Mr. Trevor Watson has submitted that there are considerations in the case which should lead me to refuse to make a vesting order even if I am satisfied that I. G. is a bare trustee for Bayer Products, Ld. He points out that, so far as the evidence goes, Bayer Products, Ld., has not a factory of its own in this country and that its activities are those which are set out in paragraph 18 of the affidavit of Mr. Frederick Ambrose Stapleton Gwatkin sworn on July 10, 1940. He points out also that, in respect of some of these patents, what are called compulsory licences have been granted by the Comptroller under s. 2 of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. He further says (and it may well be so) that it is very important that such products as those which are the subject of the patents in question in this summons should be manufactured in this country.

Further, he asked me to have regard to the conduct of the parties and suggests that the Court should inquire into the motives of the applicants in seeking a vesting order.

On this part of the case it is, perhaps, not irrelevant to know that on February 12, 1940, a letter was sent to the comptroller by the solicitors acting for the applicants in the following terms: " We enclose herewith a copy of the summons for a "vesting order covering a number of patents which stand in the "name of I. G. or their nominees. The formalities before "the Master have now been completed and the application "will come before the Judge on Monday, the 19th instant. "We are unable to indicate the time at which the application "will be heard until the list is issued next Friday. Although "the application is an ex parte application, the Master suggested "that you should be informed of the summons so that you "may consider whether you desire to raise any point on it "and, if you have no objection to the order being made, "perhaps you would be good enough to send a representative "to consent to the order when the case comes in the list on "Monday. We shall be glad if you will let us know whether this "step will be taken. In order that you may be fully acquainted "with the facts, we also enclose copies of the affidavits in "support of the application and, if you desire, we will produce "to you copies of the exhibits mentioned in the evidence." To that the reply was: " With reference to your letter of "the 12th instant regarding the summons for an order of the "Court under s. 72 of the Patents and Designs Acts, 1907 to "1939, for the rectification of the Register of Patents in respect "of a number of patents now standing in the name of I. G. "Farbenindustrie A. G. I am directed by the Comptroller to "say that he does not desire to offer any observations upon "the matter nor does he propose to appear or to be represented "at the hearing of the summons unless the Court so directs." Then the applicants' solicitors are reminded of the provisions of rule 123 of the Patent Rules, 1939. It is true that the comptroller did not appear or send a representative to consent to the order, but he did say that he did not desire to offer any observations on the matter. That is not by any means conclusive, but it is, I think, one element to be taken into consideration.

The question really comes to this: Am I inclined to say at this stage of the proceedings that, even if I find that I. G. are bare trustees for Bayer Products, Ld., I shall not make a vesting order? I am not inclined to arrive at any such conclusion or to make any such statement. As I propose to investigate the alleged beneficial title of Bayer Products, Ld., I cannot see that it is going to embarrass the comptroller if I then proceed to make a vesting order. By s. 2, sub-s. 1, of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, it is provided: "Where (*a*) an enemy or "an enemy subject is, or has at any time since the beginning "of the third day of September, 1939, been, whether alone "or jointly with any other person, the proprietor of a patent ". . . ." and so on. If I determine the beneficial ownership of these patents, whether I make a vesting order or not, and if I decide that I. G. was a bare trustee for Bayer Products, Ld., it still remains the fact that, since September 3, 1939, I. G. has been on the register in respect of these patents. To my mind, my making a vesting order cannot in any way affect the question whether I. G. has been since September 3, 1939, "the proprietor of a patent." I do not think that it would be right for me to express any view one way or the other on that question. In saying this I am not intending to indicate any doubt whether the person on the register in respect of a particular patent is the proprietor of the patent within the terms of s. 2 of the Act: I am not determining the matter one way or the other or expressing any view on it; but it seems to me that whether or not I make a vesting order on the present application cannot possibly affect, one way or the other, the powers of the comptroller under s. 2 of the Act. Either he has these powers at present or he has not. If he has, the making by me of a vesting order will not deprive him of those powers.

With regard to the other reasons put forward by Mr. Trevor Watson why a vesting order should not be made, even if I am satisfied as to the beneficial ownership of Bayer Products, Ld.,

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I do not think that I need deal with them in detail. I need say only that I have not found any reason to determine here and now that in no case will I make a vesting order, if I am satisfied of the beneficial title of Bayer Products, Ld. If and when I am satisfied that Bayer Products, Ld., is the beneficial owner of a particular patent, I propose to consider whether or not I shall make a vesting order. I do not intend to fetter my discretion at this stage.

Solicitors: *McKenna & Co.; E. C. G. Clarke.*

K. R. A. H.

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Dec. 10.

NATIONAL PROVINCIAL BANK, LIMITED *v.* LIDDIARD.

Emergency legislation—Mortgage—Legal charge to secure moneys due from third party—No personal covenant for payment—Default by debtor—Application for leave to realize security—Mortgagor not a person " liable to perform the obligation "—Leave of Court unnecessary—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 4.

Where property was mortgaged to a bank by a legal charge to secure all moneys which might become due to the bank from a person other than the mortgagor, and the mortgage contained no covenant for repayment of the debt but the usual other provisions for realization of the security upon default in payment, the bank sought the leave of the Court to enforce the security :—

Held, that the mortgagor, who was made respondent to the application, was not a " person liable to . . . . perform the obligation " in question," and therefore no leave of the Court was required.

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By a mortgage dated April 1, 1935, the respondent, T. E. Liddiard, mortgaged a house at Tunbridge Wells, belonging to him, by a legal charge to secure to the bank the repayment of all sums of money as then were or might become due upon banking or any other account from Mrs. M. B. Milburn, who was the daughter of the mortgagor. The mortgage contained the usual covenants as to the property by the mortgagor, but no covenant for repayment of the principal debt. The bank having demanded payment of the amount due and Mrs. Milburn being unable to repay it, this summons was taken out under the Courts (Emergency Powers) Act, 1939, to obtain the leave of the Court, if necessary, to enforce the security.

Morle for the applicant. The mortgage purports to be a legal charge made between the mortgagor and the bank over certain premises in Tunbridge Wells to secure the payment of all moneys due from or by the mortgagor's daughter, Mrs. Milburn, and contains the usual power of sale. There is no covenant for payment, and the mortgagor does not become liable to pay the mortgage debt. That being so, who is the "person liable to . . . . perform the obligation"? It is not the mortgagor, because he is under no personal obligation under the mortgage. Nor is it the debtor, because the application is not against her. This is a common form of charge, and it is a casus omissus from the Courts (Emergency Powers) Act, which nowhere indicates who the respondent is to be. In this respect it is not like an Act or rule which prescribes who are the persons to be served with a writ or summons. Mr. Liddiard, the respondent, not being liable to perform the obligation does not come within the protections of the Act.

Diplock (for *Leonard*, on war service) for the respondent. This is a case which ought to be covered by the Act. Sub-s. 2 (*a*) of s. 1 assumes that there is an obligation on breach of which the remedies arise, and sub-s. 4 refers expressly to the obligation. If there be an obligation, there must be a person liable to perform it. The right of sale arises under para. (*b*) of sub-s. 2. There has been a demand on the mortgagor for payment of the money, which he has failed to satisfy. Although there is no express covenant for payment there may be an implied covenant for payment. The word "obligation" is not a term of art, and should be read so as to cover an act on breach of which the remedy under sub-s. 2 arises. It is an obligation not enforceable by action, but by realization. The debtor, Mrs. Milburn, is the person liable to perform the obligation.

[FARWELL J. But she is not the owner of the property, and no order is asked for against her.]

Morle replied.

FARWELL J. This summons raises a curious point. It is an application by National Provincial Bank, Ld., against one Thomas Edmund Liddiard for (1.) realization of certain property in Tunbridge Wells, which property was mortgaged by Mr. Liddiard to the bank by a mortgage dated April 1, 1935, made between Mr. Liddiard, of the one part, and the applicants, of the other part, to secure the moneys more particularly referred to therein, or (2.) the appointment of a

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receiver of the rents and profits, or (3.) the taking possession thereof.

The bank have sought the leave of the court to exercise their remedies as mortgagees by taking possession of the property and exercising their other rights. The matter has come before the court on that application. Evidence has been filed by the respondent giving reasons why the court ought not to permit the mortgagees to exercise their powers, having regard to circumstances which have arisen and which, according to the respondent's evidence, are circumstances directly or indirectly due to the war and which are sufficient to entitle the mortgagor to relief under the Act.

The mortgage is a mortgage of this particular property belonging to Mr. Liddiard to secure no money owing by the mortgagor, but to secure money owing to the bank by a Mrs. Milburn, who is his daughter. The form of the mortgage is a common form used by banks. The mortgagor as beneficial owner charges by way of legal mortgage the property " with "payment to the bank on demand of all such sums of money "as now are or shall from time to time become due or owing "to the bank anywhere on banking account or upon any "discount or other account or for any other matter or thing "whatsoever, including interest, discount, commission and all "other banking charges from or by Mildred Bessie Milburn, "of Tunbridge Wells in the county of Kent, married woman." Then the mortgage contains the usual provisions that " (*a*) The "mortgagor will at all times during the continuance of this "security keep the buildings in a state of good repair. . . . ." "(*b*) The statutory powers of sale shall be exercisable at any "time after the expiration of one month next after the bank "shall have demanded payment by the mortgagor of the "moneys owing on this security without regard to section 103 "of the Law of Property Act, 1925, which section shall not "apply. . . . ." "(*c*) The mortgagor shall not without the "previous written consent of the bank exercise any of the "powers of leasing or of agreeing to lease or of accepting "surrenders conferred upon mortgagors by the Law of "Property Act, 1925." There are other provisions which are usual in a mortgage of this kind; provision that it is to be a continuing security for the whole amount due, and that the mortgagor attorns tenant from year to year to the bank, the rent being a peppercorn rent.

What has happened is that Mrs. Milburn has found herself unable to pay the bank and the bank have accordingly demanded payment of the amount due by Mrs. Milburn from the mortgagor, Mr. Liddiard. Mr. Liddiard is under no personal obligation whatsoever under this mortgage to pay anything to the bank. His position is that he has an option open to him. He can either pay the bank the money owing by his daughter or, if he does not pay the bank, he is in peril of having his property seized by the bank. But he is personally under no obligation to pay anything to the bank in respect of Mrs. Milburn's liability.

In the circumstances, the bank, being desirous of exercising their right to possession of the property, have applied to the court for leave under the Courts (Emergency Powers) Act, 1939. Having applied for such leave, they now come to the court and say that they do not in fact require any leave in this case, because the Courts (Emergency Powers) Act, 1939, does not apply to it and that, therefore, they are entitled to proceed to exercise their remedies without having to obtain the leave of the court at all. The question which arises, and I think that it is of some difficulty, is whether that is the true view, or whether the true view is that they have to obtain the leave of the court, in which event it will be necessary for the court to go into all the circumstances and see whether or not the case is one in which the mortgagees should or should not be given leave, and on any particular terms, to employ the remedies otherwise open to them.

For the moment I am not dealing at all with the merits of this particular application; I am dealing with a very much wider point—namely, whether or not the case comes within the Act at all. Sect. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1939, provides: "Subject to the provisions of this "section, a person shall not be entitled, except with the leave "of the appropriate court, to proceed to execution on, or

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"otherwise to the enforcement of, any judgment or order of "any court . . . . for the payment or recovery of a sum of "money." There is nothing in that sub-section which has any application at all. Sub-s. 4, which is the material sub-section, provides: "If, on any application for such leave as is "required under this section for the exercise of any of the rights "and remedies mentioned in subsections (1.), (2.) and (3.) of this "section, the appropriate court is of opinion that the person "liable to satisfy the judgment or order, or to pay the rent or "other debt, or to perform the obligation, in question is unable "immediately to do so by reason of circumstances directly or "indirectly attributable to any war in which his Majesty "may be engaged, the court may refuse leave for the exercise "of that right or remedy, or give leave therefor subject to such "restrictions and conditions as the court thinks fit." The section, as will be seen, applies in this way. It is for the person who is seeking to exercise the powers of, for example, foreclosure to apply for such leave, and it is for the respondent, the person against whom the leave is sought, to show that he is entitled to relief under the Act because he can bring himself within the provisions of sub-s. 4. That person has, therefore, to satisfy the court that he is a person "liable to satisfy the "judgment or order, or to pay the rent or other debt, or to "perform the obligation" and that he is "unable immediately "to do so by reason of circumstances directly or indirectly "attributable to . . . . war."

The question is whether Mr. Liddiard, who is the respondent, is able to satisfy the court that he is a person liable to perform the obligation against which he is seeking this relief. "The "obligation" must mean, as it seems to me, the obligation which arises under the mortgage which the mortgagee is seeking to enforce. The mortgagee's only right to take possession of the property and realize his security is such right as he may have against the mortgagor by virtue of his mortgage. It is, therefore, necessary, I think, to find, in order that the matter may come within sub-s. 4, that there is an obligation on the mortgagor which he is unable to satisfy by reason of circumstances directly or indirectly attributable to war. In the present case, so far as I can see, he is under no obligation whatsoever to the bank. He is in the position that the bank have demanded payment of the money owing by Mrs. Milburn. That does not create an obligation on the mortgagor to pay anything. It puts him in the position that either he must find the money which is demanded or the mortgagees will be entitled to realize their security. The fact that he is put in that dilemma does not create an obligation of any kind on him. He is under no obligation to pay the money. If he chooses not to pay, or is unable to pay, he may find himself in the unhappy position of having his property taken away from him. That may be his misfortune, but it does not create an obligation arising from the mortgage into which he has entered which he has to satisfy. The mortgage creates no such obligation whatsoever.

The position, therefore, is that the case is not one which comes within the Act at all. It may be that it is a casus omissus. It may be that, if the Act had intended to protect a person in the position of the mortgagor in this matter by giving an opportunity of getting relief under the Act, it would have so provided. But it has not, so far as I can see, on the language of the Act, made any such provision for this particular case and in the circumstances it is not for me to make a remedy by giving to the words " perform the obligation " a meaning which, in my judgment, they cannot bear. The truth of the matter is that this does not come within the Act at all. This mortgagor is in the unfortunate position of not being able to take the remedy which is open to him of relieving his property by paying money which Mrs. Milburn owes, but that does not create an obligation on him to pay the money, and the fact that he cannot pay will have the result that the bank will be entitled to exercise their remedies by way of realizing the property. I am unable in this case to give the respondent any relief under the Courts (Emergency Powers) Act, 1939, not because he has not shown sufficient cause (because I have not considered the particular merits of the case in any way), but because in my judgment the Act does not provide for this particular form of case.

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National Provincial Bank, Ld. v. Liddiard.

It is then said that I ought in the circumstances to allow Mrs. Milburn to be added as a respondent and that I ought to give relief in respect of her. The answer to that is that it is not for me on the application of Mr. Liddiard to add Mrs. Milburn to this summons. If the mortgagees choose to proceed to exercise their remedies against the property itself, and if it should turn out hereafter that they ought to have got leave from the Court as against Mrs. Milburn (as to which I express no view whatever), that will be at their peril and Mr. Liddiard may have a remedy. But, so far as this particular summons is concerned, which is a summons taken out by the bank against Mr. Liddiard, I can do nothing more than dismiss the summons on the ground that no leave is necessary because the case is not one which is provided for by the Act.

There will be no order as to costs.

Solicitors: *Wilde, Sapte & Co.; Cripps, Harries, Hall & Co.*

H. L. L.

In re BIKKER'S APPLICATION.

MORTON J.

1940 Nov. 27.

Emergency legislation—Mortgage—Arrears of interest—Application for leave to enforce security—Evacuation area—Evacuation period—Receiver to be appointed of arrears—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67)*—Defence (Evacuated Areas) Regulations,* 1940 (*St. R. & O.*, 1940, *No.* 1209), *regs.* 3, 4.

On an application under the Courts (Emergency Powers) Act, 1939, for leave to enforce a mortgage of unoccupied property by the appointment of a receiver, the Master refused to give such leave on the ground that the property was in an "evacuation "area," the subject of an order made under the Defence (Evacuated Areas) Regulations, 1940 :—

Held, that under a proviso to reg. 4 the Court could appoint a receiver, but with power to apply any moneys coming into his hands in payment only of arrears of interest which became due before the date of the order.

ADJOURNED SUMMONS.

The summons was taken out by Andrew Bikker the mortgagee of certain premises, the locality of which was not stated in Court, under a statutory mortgage dated September 15, 1937, between the said Andrew Bikker and Frederick Rolls to secure 425*l.* with interest thereon at 4½ per cent. per annum payable in March and September in each year. The property was at present unoccupied, and the interest was in arrear for the last eighteen months. The summons asked for leave under the Courts (Emergency Powers) Act, 1939, to appoint a receiver. The Master refused to make any order on the ground that the property was situate in an "evacuation area" within the Defence (Evacuated Areas) Regulations, 1940, the material clauses of which are set forth in the judgment.

Burnett-Hall (for *R. J. Thompson,* on war service) for the applicant.

The Master refused to make an order under the Courts (Emergency Powers) Act, 1939, on the ground that the area in which the property is situate had been declared, by order of the Minister of Home Security, to be an "evacuation area." The applicant did not know this, and asked for production of the order, but the Master said he could not produce it or give any further information about it, as it was a secret order. It was said that the order was made, as regards this area, on July 16, 1940, and therefore that since then no proceeding can be taken to recover any rent, mortgage interest or other money due. But the order does not apply to any rent or mortgage interest due before the period of evacuation, and in the present case interest has been in arrear for 18 months, or for a year before the date of the order. I admit that the principal is not due and payable. The case comes within proviso (2.) to reg. 4 (1.) and the applicant is entitled to appoint a receiver.

The respondent did not appear.

MORTON J. [after stating the facts:] By reason of s. 117, sub-s. 2, of the Law of Property Act, 1925, there is implied in the mortgage a covenant with the mortgagee by the person therein expressed to charge as mortgagor to the following effect: "That the mortgagor will, on the stated day, "pay to the mortgagee the stated mortgage money, with "interest thereon in the meantime at the stated rate, and will "thereafter, if and as long as the mortgage money or any part "thereof remains unpaid, pay to the mortgagee (as well after "as before any judgment is obtained under the mortgage) "interest thereon, or on the unpaid part thereof, at the stated "rate, by equal half-yearly payments the first thereof to be "made at the end of six months from the day stated for "payment of the mortgage money." For reasons which will shortly appear, it is essential for the applicant in the present case to show that certain interest was in arrear on July 16, 1940. Counsel informs me that the last payment of interest was on March 15, 1939, so that the interest payable in September, 1939, and March, 1940, was unpaid on July 16, 1940.

The point which arises in the present case is, so far as I am aware, a novel one and it may be of some importance. On July 16, 1940, an order was made under the Defence (Evacuated Areas) Regulations, 1940, declaring the part of the country in which the mortgaged property is situated to be an evacuation area. Reg. 2 provides (inter alia): "'Evacuation area' means any area declared to be an "evacuation area for the purposes of these regulations; "'evacuation period' means (*a*) in relation to any unoccupied "premises in an evacuation area"—the premises here in question were unoccupied at the date of the order—"the "period commencing with the date of the order declaring the "area to be an evacuation area or the date on which the "premises became unoccupied, whichever is the later, and "ending with such day as may be appointed in relation to "the area by an order of the Minister of Home Security." By reg. 3 (1.): "Where it appears to the Minister of Home "Security that by reason of the extent to which any part of "a defence area has been or is likely to be evacuated these "regulations ought to apply in relation thereto, he may "declare that part of the defence area to be an evacuation "area for the purposes of these regulations." That is the sub-regulation under which the order was made. The regulation continues: "(2.) Nothing in s. 3 of the Rules Publication "Act, 1893, shall apply to any order made under "this regulation; but the Minister of Home Security shall "cause notice of the effect of the order to be given as soon as "may be in such manner as he thinks necessary for bringing "it to the notice of the persons in the evacuation area and of "any other persons who in his opinion ought to have notice "of the order. (3.) The Lord Chancellor shall take steps to "supply Courts with copies of the order authenticated in such "manner as he may direct, and a Court to which any such "copy is supplied shall not require any further proof of the "order." I have not actually seen the order in question, but the Chief Master has stated that such an order has been made and counsel for the applicant is content to accept that such an order was made on July 16, 1940.

Reg. 4, so far as material, provides: "(1.) Subject to "the following provisions of this regulation—(*a*) no rent or "rates payable in respect of any premises in an evacuation "area which are unoccupied at the date when the area is "declared an evacuation area, or subsequently become "unoccupied, and no sum secured or charged on any such "premises . . . shall be recoverable during the evacuation "period." In the present case the principal sum, and also the interest, secured by the mortgage were, in my view, clearly sums secured or charged on the premises. The result is that, subject to the provisions which I am about to read, the applicant could not recover these sums during the evacuation period. The regulation proceeds: " and no remedy arising in "consequence of a default in the payment of any such rent, "rates or sum as aforesaid shall be enforceable (whether by "proceedings in any Court or otherwise) during the evacuation "period." That provision would prevent the applicants from succeeding on this application but for the following proviso: "Provided that this paragraph shall not apply . . . (ii.) to "any such rent or sum as aforesaid which accrued due and "payable before the commencement of the evacuation "period." By sub-reg. 2 of reg. 4 it is provided: " For the purposes of the proviso to the foregoing para-"graph . . . (*b*) no part of any capital sum secured or "charged as aforesaid and not payable or repayable by "instalments shall be deemed to have accrued due and payable "unless and until a written demand for payment has been "served on the person liable and a period of three months, or "such longer period as may have been specified in the demand, "has elapsed since the service of the demand."

Mr. Burnett-Hall, for the applicant, bases his case simply on the fact that there were instalments of interest which accrued due and payable before the beginning of the evacuation period and he says that, by reason of the proviso which I have already read, it is open to him to pursue his remedy in respect of the sums by way of interest which accrued due before the beginning of the evacuation period. I think that that contention is well founded. Sub-reg. 2 (*b*) of reg. 4 refers only to a capital sum, and I can find nothing in the regulations which would prevent the applicant in the present case from pursuing his remedy in respect of interest. I propose to give the applicant liberty to proceed to exercise any

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remedies which may be available to him by way of appointment of a receiver of the property comprised in the legal charge.

If the applicant does appoint a receiver, the appointment will have one curious result, so far as I can see, under the regulations, which is that the receiver will only be at liberty to apply any moneys which may come to his hands in payment of the instalments of interest which fell due before the beginning of the evacuation period and have not yet been paid. That may be a somewhat unforeseen result, but it seems to me to follow from the regulations.

Solicitors: *Shelton, Cobb & Co.*

H. L. L.

FARWELL J.

1940 Dec. 11.

In re LINDSAY'S SETTLEMENT (No. 1).

Settlement—Capital and income—Public works—Special Act of Parliament incorporating Lands Clauses Acts—Damage apprehended to settled estate—Provisions for compensation—Arbitration not proceeded with—Agreement between parties—Agreed compensation not capital moneys, but casual profit of tenant for life.

The Thames Conservators in 1933 were authorized by a private Act of Parliament to undertake works for the improvement of the navigation of the river, involving new cuts which might damage private property, and the Act contained special provisions for the protection of a settled estate and a ferry belonging to it. The Act incorporated the Lands Clauses Acts and provided that any claims for compensation should be referred to arbitration, unless otherwise agreed in writing between the estate owners and the conservators.

A claim made by the tenant for life of the estate for compensation for damage was referred to arbitration, but the arbitration was not proceeded with, and the parties in November, 1939, entered into an agreement in writing under which the conservators agreed to pay and the estate owners and the lessee of the ferry to accept a lump sum in settlement, the conservators being released from all further liability.

On a summons taken out by the trustees of the settlement to determine the question whether the compensation was capital money or belonged to the tenant for life :—

Held, that the agreement under which the money was paid excluded the operation of the Lands Clauses Acts, and brought the case under the general law. The money represented damages for acts done to the property, and was, therefore, not capital money, but belonged to the tenant for life as a casual profit.

In re Williams's Settlement [1922] 2 Ch. 750 followed and applied.

ADJOURNED SUMMONS.

The summons was taken out by the trustees of a marriage settlement dated October 26, 1923, by which an estate at Shepperton, bordering on the river Thames, was settled upon trusts under which William Herbert Lindsay, the husband, was tenant for life. There had been no issue of the marriage, and if there were no issue the estate, subject to the life interest of the wife, would revert to Mr. Lindsay. The question raised by the summons was whether a sum of 750*l.* paid to the trustees by the Conservators of the River Thames under an agreement of November, 1939, as compensation for damage done to the settled estate by works which had been carried out by the conservators in pursuance of a special Act of Parliament of 1933, was capital money or belonged to the tenant for life.

The facts are fully stated in the judgment of the learned judge.

Droop for the plaintiffs. The claim in the arbitration was made under s. 68 of the Lands Clauses (Consolidation) Act, 1845, which was incorporated in the conservators' Special Act, and the provisions of that Act control the destination of the moneys.

The damages to the reversion to the ferry came under s. 74. *In re Barrington* (1) and as the lease had thirty-seven years to run and the tenant for life is sixty-eight years old, the whole of the damages should be treated as capital.

The damages to Ferris meadow come under s. 69 and are capital. *In re Robinson's Settlement Trusts.* (2) If the damages had been for trespass, it is conceded that the tenant for life would be entitled to them as a casual profit. *In re Williams's Settlement* (3) where compensation under the Indemnity Act, 1920, was held to be a casual profit is distinguishable, as that Act contained no provisions as to how the compensation should be dealt with, and the acts in respect of which it was awarded were really a trespass.

Here the special Act provides for the destination of the compensation: *In re Bladon.* (4) The transaction was the compulsory acquisition of a right, as in *In re Penrhyn's Settlement Trusts.* (5) If the tenant for life had sold his rights to the conservators, he could only have done it under his Settled Land Act powers.

The Settled Land Act, 1925, does not appear to affect the position directly. Money received on a compromise under

(1) (1886) 33 Ch. D. 523.
(2) [1891] 3 Ch. 129.
(3) [1922] 2 Ch. 750.
(4) [1912] 1 Ch. 45.
(5) [1923] 1 Ch. 143.

s. 58 is by s. 61 capital unless the Court otherwise directs, but if the damages belonged to the tenant for life as a casual profit a compromise as to their amount would not be a compromise within the section. And see s. 81.

Romer K.C. and *Stranders* for the defendant Lindsay. The matter is entirely outside the settlement, and the money belongs to the tenant for life because there was no compromise by him within ss. 58 and 61 of the Settled Land Act, 1925. It is not analogous to purchase money on a sale, but is a simple case of damage to property occurring within the lifetime of the tenant for life. And accordingly it is a windfall to which he is entitled. *Brigstocke* v. *Brigstocke* (1) lays it down clearly that a tenant for life is entitled to all casual profits occurring during his tenancy. The question for the Court is whether this is such a windfall. We submit that it is, because it is not a sale or a quasi-sale, and so *In re Penrhyn's Settlement Trusts* (2) and cases of that type do not apply. Further the matter is not concluded by the Lands Clauses (Consolidation) Acts so far as they have been incorporated, because the rights of the parties are only to be regulated by those Acts if the transaction was carried out thereunder. The Thames Conservancy Act empowered the parties to act outside the Lands Clauses Acts by entering into a written agreement. This is what they have done here. The arbitration was never held at all, and the compensation moneys were never paid into Court as directed by the Acts. The whole procedure of the parties shows that they intended to deal with the matter outside those Acts, as they were entitled to do. Sect. 81 of the Settled Land Act, 1925, does not conclude the matter against the tenant for life, because only moneys, which ought as between the persons interested in the settled land to be treated as capital, are capital under that section and, therefore, the whole question is left open by the section which does not, except in specified instances, such as damages for breach of covenant in a lease under s. 80, affect or destroy the old doctrine of casual profits. This case is within the principles laid down by Kay J. in

(1) (1878) 8 Ch. D. 357.

(2) [1923] 1 Ch. 143.

In re Barrington (1) and more particularly is governed by *In re Williams's Settlement.* (2)

FARWELL J. This summons raises a question which is not wholly free from difficulty, on which I have had the advantage of very helpful arguments on both sides. The summons is taken out by the present trustees of a settlement dated October 26, 1923, asking for the determination by the Court of the question whether certain sums of money, which have been paid under an agreement made between the conservators of the river Thames and the trustees and the tenant for life and the tenant of the particular ferry in question, are capital money and form part of the settled property, or are in the nature of a windfall and as such belong to the tenant for life.

The facts so far as they are relevant are as follows. The settlement in question was made on the occasion of the marriage of the present tenant for life, William Herbert Lindsay, and Miss K. B. Synnott, and the settlement is of certain properties and lands in Middlesex and Surrey which are referred to in the schedule to the settlement. Under the settlement the provision is that the estates are held by the trustees and their heirs to the uses following: after the solemnization of the said marriage to the use of the husband during his life without impeachment of waste, including equitable waste, and from and after the husband's death there is a yearly sum of 500*l.* payable to the wife during her widowhood, and a power to the husband to appoint by will or deed or new appointment " to the use of or in trust for "such one or more of the issue of the spouses (whether "immediate or remote) in such form and manner in every "respect (including a trust for sale if so desired) and upon "such conditions and subject to such limitations or trusts to "take effect by way of defeasance as (subject to the law "relating to perpetuities) the husband may by deed with or "without power of revocation and new appointment or by "will or codicil appoint."

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(1) 33 Ch. D. 523.

(2) [1922] 2 Ch. 750.

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LINDSAY'S SETTLEMENT (No. 1), *In re.*

Up to the present moment there has been no child of the marriage of these spouses, but, of course, it is possible that there may be children yet. Both the husband and wife are alive, and the ultimate trust in default of issue is to the husband, so that, if there are no children of the marriage, the husband will become absolutely entitled to the estate, subject to any interest his wife may take. On June 7, 1926, there was a vesting deed duly vesting the property in the tenant for life and the position was quite clearly established that the husband was the tenant for life and as such entitled to the possession of the property.

In, or about, 1933 the River Thames Conservators desired to carry out certain works on the Thames, and the tenant for life and the trustees were apprehensive that by carrying out such works damage might result to the settled property. Accordingly, when the conservators sought power to carry out their desired works by Act of Parliament the trustees and the tenant for life were represented and opposed the application with the result that special provisions with regard to the land in question were inserted into the Act which the conservators obtained. The Act, which is the Public Works Facilities Scheme Thames Conservancy (River Improvement) Confirmation Act, 1933, contained a section to which I must refer quite shortly. Para. 4 of the schedule to the Act provides for the incorporation into the Act of the Lands Clauses Acts in these terms: "Subject to the necessary adaptations the "following Acts and parts of Acts so far as the same are "applicable for the purposes of and are not varied by or "inconsistent with the provisions of this Scheme are "incorporated with and form part of this Scheme (that is to "say) :—The Lands Clauses Acts (except ss. 127 to 131 of the "Lands Clauses Consolidation Act, 1845) ; the provisions of "the Railways Clauses Consolidation Act, 1845, with respect "to the temporary occupation of lands near the railway during "the construction thereof."

I need not refer to any other sections of this Act until I come to para. 39, except to say that para. 6 of Part II. of the Schedule to the Act refers to the works which the conservators have power to do under the Act, and the first of the works, work No. 1, is the one in question which might, or it was thought might, damnify the property of the estate. Para. 39 is in these terms: "The following provisions shall apply and have "effect for the protection and benefit of William Herbert "Lindsay and the trustees of the Lindsay Estates as owners "of the ferry known as 'the Weybridge Ferry' (in this section "referred to as 'the owners') and of Frank Long as lessee of "the rights in the said ferry (in this section referred to as 'the "'lessee') unless otherwise agreed in writing between the owners "and the lessee for their respective interests as aforesaid and "the conservators . . . . (2) Any claim which may be made "for compensation by the owners in respect of diminution in "the value of their rights in the said ferry or by the lessee "in respect of an increased cost of labour by reason of the "elongation of the said ferry in consequence of the construction "of the said work No. 1 shall be referable to arbitration under "the Lands Clauses Acts and for the purposes of any such "claim the said ferry shall be deemed to be 'lands' within the "meaning of the Lands Clauses Acts Provided that any such "claim shall be made within two years from the completion "of the said work."

The damage which it was feared might result to the settled land by the works which were proposed was, first, damage to the right of ferry which formed part of the settled property known as the Weybridge Ferry. That right of ferry was the subject of a lease which had been granted by the tenant for life and at that time had some thirty-seven years to run. It was a lease at 200*l.* a year and it was feared that, as a result of the operations on the river Thames, the ferry might be damaged, and that loss might occur to the estate by reason of the fact that after the expiration of the lease the chances of letting the ferry right might be reduced and less might be paid for it.

The other matter which concerned the estate was that certain property, immediately adjoining the river and belonging to the estate, might become liable to erosion as a result of the work done by the conservators and thereby damage might be caused to that portion of the settled property. The tenant for life and the trustees were therefore anxious to protect the settled property by claiming such damages as were proper to indemnify them against the losses which they feared might result from the works when done. To protect the position they sought for and obtained from Clauson J. an order dated January 18, 1937, by which it was ordered " that the applicant "as tenant for life under the above-mentioned settlement . . . . "be at liberty to make a claim for compensation against the "conservators of the river Thames in respect of diminution in "the value of the rights in the ferry known as the Weybridge "Ferry settled by that settlement in consequence of the "construction of certain works authorized by the Thames "Conservancy (River Improvement) Act, 1933, and if necessary "to take steps on a reference to arbitration of the said claim "pursuant to the said Act, but this order is to be without "prejudice to any question whether and if so how any compensation recovered and the costs incurred in connection "with the claim ought to be apportioned as between capital "and income." That order authorized the tenant for life and the trustees as representing the settled land to put forward that claim against the conservators. The result of putting it forward was that the matter was, in the first instance, referred to arbitration under the Lands Clauses Act. There was some correspondence about the matter, but it was finally referred to arbitration and an arbitrator was appointed accordingly.

The claims which were put forward by the tenant for life and the trustees were claims in respect of the ferry which, as I said, was let for a term of fifty years from September 29, 1927, and a claim for damage to the reversion by the acts which the conservators were purporting to carry out. Claims were also put forward by the lessee of the ferry and there was also a claim in respect of the possible damage to the ferry meadow, a strip of land which it was thought would be affected. The tenant for life and the trustees were advised by competent persons as to the sums which they could properly claim as damages. As I said, the claim ultimately was referred to arbitration and the late Mr. Theobald Mathew was appointed arbitrator, but, unfortunately, before the arbitration had proceeded at all, or anything had been done under it, Mr. Theobald Mathew died. Moreover, by that time the present war had begun and the parties were busy people who had other and possibly more important things to deal with than this sort of question, and they therefore finally agreed not to have an arbitration at all, but to settle the whole matter outright, by having a conference between the conservators, the lessee of the ferry, the tenant for life and the trustees, and ultimately the agreement of November 18, 1939, was entered into. I should say that, when the work which was proposed to be done by the conservators had in fact been carried out, it was found that the estimated damage which it was thought the estate would suffer as the result of the works was very much less than had been feared. So far as the ferry was concerned, it was found that no very great difference was made, and that the ferry could be carried on without any very substantial additional cost by reason of the works done by the conservators. Further, it was found that the erosion which they feared would be on a smaller scale than was expected, and that, having regard to the value of the land in question, the claim to any damage which could properly be supported would be very considerably less than the amount which they had originally thought right to claim.

The agreement of November 18, 1939, recited: "The "conservators have carried out works for the purpose of "improving the river Thames and in particular have widened "and deepened the river Thames and made new cuts in the "vicinity of Weybridge Ferry and Ferris Meadow and other "lands and properties of the owners." It then recited: "The owners are the owners of land and of the said Weybridge "Ferry and the tenant is the successor in title of Frank Long "and Edmund Batty (deceased), to whom the said ferry "was demised by the said William Herbert Lindsay under a "lease dated January 3, 1928, for a term of fifty years from "September 29, 1927, under a deed of assignment dated

"September 26 and made between the said Frank Long of the "one part and the tenant of the other part." The tenant claimed to be the owner of the ferry under the lease.

The agreement further recited: "There is pending an "arbitration in which the owners and the tenant are respectively "claiming compensation for damage to them their interests "lands and properties in the said ferry and the owners are "also claiming compensation for damage to their lands known "as Ferris Meadow all of which claims the conservators dispute. "The river improvement works or some of them may have "caused or may cause further damage to the interests lands "and properties of the owners and tenant. The parties have "agreed to settle their dispute and all or any further claims by "the owners or tenant which may arise out of the execution "of the river improvement works." It is then witnessed: "In consideration of the payment to the owners by the "conservators of the total sum of 750*l.* (which payment the "owners hereby acknowledge) the owners and each of them "hereby release the conservators from all and any liability "for compensation for loss or damage to them their interests "lands or properties (including diminution in the value of "their rights in the said ferry and damage to Ferris Meadow) "which may have resulted or may result from any river "improvement works which have been executed by the "conservators prior to the date of this agreement in pursuance "of the Public Works Facilities Scheme Thames Conservancy "(River Improvement) Confirmation Act, 1933, or other "statutory powers of the conservators." In consideration of the payment to the tenant of 1200*l.*, the tenant released the conservators from all responsibility (para. 2).

There was also an agreement with regard to costs.

The agreement having been entered into, the sums which the conservators agreed under that agreement to pay were paid and steps were taken with respect to the costs. The sums to be paid in respect of the settled property were paid not into Court, as they would have been in the ordinary course under the Lands Clauses Act, but to the trustees, and they are in the hands of the trustees. This summons is taken out to determine who are entitled to the sums in question: whether they form part of the capital moneys of the estate, or whether they belong to the tenant for life.

It has been argued before me that these moneys are capital moneys, that this transaction was something in the nature of a sale by the owner of the settled land. It was put that the tenant for life and the trustees were agreeing with the conservators to take certain sums of money in consideration of the release of their claim against the conservators for damage which, they alleged, the conservators had done to the settled property, and it is said that the moneys so paid were in fact moneys paid under the Lands Clauses Act, having regard to the terms of the private Act, and that, having been paid in that way, strictly speaking, they should have been paid into Court, and that they would, in those circumstances, be capital moneys which would not be properly payable to the tenant for life.

On the other hand, the tenant for life contends that what took place in this particular case was not anything done under the Lands Clauses Act at all. It is said that it is true that the matter proceeded up to the agreement for arbitration under and by virtue of the Lands Clauses Act, because it was incorporated into the private Act, but that, having got so far, the parties then determined to abandon the arbitration and to proceed, not under the Lands Clauses Act, but under the provisions of para. 39 of the schedule to the private Act, which enabled them to agree, in writing, to another method of determining the rights, or adjusting the rights, of the parties. By that section they ceased to act under the Lands Clauses Act and entered into an arrangement under which the conservators paid certain moneys and the estate, as represented by the tenant for life and the trustees, gave up all claims which they might have against the conservators in respect of that alleged damage, and therefore, in those circumstances, the rights of the parties in respect of these particular sums of money ought to be determined on the general law in relation to a payment of this sort and not by any reference to the Lands Clauses Act.

Mr. Romer, representing the tenant for life, was prepared to concede that, if this was a matter which was regulated by and proceeded under the Lands Clauses Act, it would be very difficult for him to support the contention of the tenant for life that these were not capital moneys. But he said that that was not the true position, because, though up to the point when the parties were proposing arbitration they may have been proceeding under that Act, so soon as they abandoned the idea of an arbitration and did not appoint a new arbitrator after the death of the original arbitrator, and had agreed instead of proceeding by arbitration to accept payments under this agreement, there was no longer any question of the Lands Clauses Act. In those circumstances, he contends, the payments should be dealt with under the general law under which, he says, the tenant for life is entitled to the money.

I have given this matter my best consideration, and I have listened carefully to the interesting argument of Mr. Droop, but I have come to the conclusion that the tenant for life is right in his contention that the agreement was not an agreement entered into with any reference to the Lands Clauses Act. The arbitration was put an end to when once the parties agreed to proceed not by arbitration, but in a different way, namely, by agreeing the amounts to be paid.

That being so, it only remains for me to decide what is the position of the parties having regard to the general law which is to be applied. This is a case where the conservators, acting legally, because they were acting under statutory powers, have done acts which have resulted in damage to the settled property, and the amount of that damage has been agreed between the tenant for life and the trustees as representing the settled property, on the one hand, and the conservators, on the other, and the amount agreed paid by the conservators. In those circumstances, in my judgment, the moneys paid are moneys to which the tenant for life is entitled. I think that this case is almost exactly covered by the decision of Sargant J. in *In re Williams's Settlement.* (1) In principle I can see no difference between that case and the present when once the point is reached that the case is not one to which the Lands Clauses Act applies, but is simply a case in which the moneys in question may belong to the tenant for life or may not, as the case may be. In this case, as in that before Sargant J., the moneys in question represent damages which have been recovered for acts done lawfully, but which have resulted in damage to the property, and as Sargant J. came to the conclusion in his case that those were payments to which the tenant for life was entitled, so in the present case I think that I should follow his decision and hold that the payments in this case properly belong to the tenant for life and accordingly should be paid to him and not be retained as part of the capital of the settled estate. I will make a declaration accordingly.

Solicitors: *Cohen & Cohen.*

(1) [1922] 2 Ch. 750.

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In re HARLAND-PECK.

HERCY *v.* MAYGLOTHING.

[1940. H. 1509.]

Administration—Bequest of residuary estate " subject to the payment " of funeral and testamentary expenses, duties, debts and legacies to two named persons—Death of one legatee in lifetime of testatrix—Lapsed share—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 3; *Sch. I., Part II.*

The will of a testatrix contained the following provision: " Subject to the payment of my funeral and testamentary expenses " death duties including estate duty and increment value duty " if any and debts and the legacies bequeathed by this will or any " codicil hereto and the legacy duty on legacies bequeathed free " of duty I devise and bequeath all the rest and residue of my " property of whatsoever kind or nature and wheresoever situate " real or personal including any property in respect of which I " have a general testamentary power of appointment to " two named persons. The testatrix died on March 2, 1939. One of the residuary legatees predeceased her and his share lapsed:—

Held, reversing Farwell J., that the order of administration prescribed by Part II. of Sch. I. to the Administration of Estates Act, 1925, did not apply, and that the debts were payable out of the whole residuary estate and not out of the lapsed share in exoneration of the remaining share.

In re Kempthorne. Charles v. *Kempthorne* [1930] 1 Ch. 268 followed.

APPEAL from Farwell J.

By her will dated June 3, 1920, Agnes Harland-Peck, the testatrix, after appointing executors and giving a number of pecuniary bequests and specific gifts, bequeathed her business (carried on under the style of William Harland & Son) and the land occupied by it with the goodwill, stock-in-trade, machinery, plant and effects and the benefit of all subsisting contracts and the book debts to a number of persons employed by her in the business. And her will contained the following provisions: " subject to the payment of my funeral and "testamentary expenses death duties including estate duty "and increment value duty, if any, and debts and the legacies "bequeathed by this my will or any codicil hereto and the

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"legacy duty on legacies bequeathed free of duty I devise "and bequeath all the rest and residue of my property of "whatever kind or nature or wheresoever situate whether "real or personal including any property in respect of which "I have a general testamentary power of appointment to" the plaintiff and Dr. Gibbons in equal shares.

The testatrix, a lady of considerable wealth, died on March 2, 1939. Some of the persons to whom the business was given predeceased her so that their shares of the business fell into residue. Dr. Gibbons also predeceased her and the defendant Mayglothing, as the testatrix's next of kin, became entitled to Dr. Gibbons's share of the residue.

On April 16, 1940, a summons was taken out by the plaintiff for the determination of the following questions : "(1.) Whether "upon the true construction of the testatrix's will the debts "and liabilities of the said business of William Harland and "Son subsisting at the date of the testatrix's death should be "borne by the persons who are, whether under the will of the "testatrix or on her partial intestacy, entitled to the said "business and in shares proportionate to their shares therein, "or whether the said debts and liabilities should be borne "by the testatrix's residuary estate in a due order of adminis- "tration. (2.) Whether (*a*) the primary fund for the payment "and discharge of the funeral, testamentary and adminis- "tration expenses and debts of the testatrix and of all pecuniary "legacies bequeathed by her will and codicil and of the legacy "duty on legacies bequeathed by her said will free of duty or "of any and which such liabilities is that part of the testatrix's "estate as to which she died intestate, or (*b*) such liabilities "should be borne rateably by the entire residuary estate of "the testatrix."

Farwell J. held (*a*) that the debts and liabilities of the testatrix incurred in carrying on the business ought to be borne by the residuary estate of the testatrix ; and (*b*) that the primary fund for the payment of the funeral, testamentary and administration expenses and debts (including the debts and liabilities of the business) and of the pecuniary legacies and legacy duty on legacies given free of duty was

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that part of the estate of the testatrix as to which she died intestate.

The defendant Mayglothing appealed from the second part of the order only, and asked that in lieu thereof it might be declared that the funeral, testamentary and administration expenses and debts of the testatrix, including therein the debts and liabilities of the testatrix's business and the pecuniary legacies bequeathed by her will and codicil, and the legacy duty on legacies bequeathed by her will free of duty ought to be paid and discharged rateably out of the entire residuary estate of the testatrix.

Roxburgh K.C. and *L. R. Norris* for the appellant. The principle was laid down in *In re Kempthorne* (1), an exactly similar case to this, that the testator by directing that his debts should first be paid out of the residue of his estate before division amongst the residuary legatees had shown an intention that the order of administration prescribed by Part II. of Sch. I. to the Administration of Estates Act, 1925, should not apply, and that they were not payable out of the lapsed shares in exoneration of the other shares. That principle applies here, and the funeral and testamentary expenses, debts, legacies and duties are payable by the whole of the residuary estate and not by the lapsed share in exoneration of the respondent's share. The share of Dr. Gibbons lapsed by reason of his death during the lifetime of the testatrix: *In re Worthington* (2). That brings in s. 34, sub-s. 3, and Sch. I., Part II., of the Administration of Estates Act, 1925, but *In re Kempthorne* (1) decided that the order of administration prescribed by Schedule I., Part II. to the Administration of Estates Act, 1925, did not apply, and there is nothing to differentiate that case from the present one. This appeal should be allowed.

They also cited *In re Tong* (3) and *In re Sanger* (4).

Vaisey K.C. and *Raymond Jennings* for the respondent.

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(1) [1930] 1 Ch. 268.

(2) [1933] 1 Ch. 771.

(3) [1930] 2 Ch. 400; [1931] 1 Ch. 202.

(4) [1939] 1 Ch. 238.

The question is whether the surviving residuary legatee can throw all the burden of the payments on to the lasped share or whether he has to share half of them. There are many cases in which a beneficiary benefits to a very large extent by the death of a co-beneficiary in the lifetime of the testator. There is no "contrary intention" shown in this will, for although the whole residuary estate is made subject to the payments, the final adjustments are not dealt with, and therefore Schedule I., Part II., is to be read into this will, as if it were part of it. There is nothing in *In re Kempthorne* (1) to prevent this Court from finding in favour of the respondent. If *In re Kempthorne* (1) and *In re Worthington* (2) are not reconcilable, then *In re Worthington* (2) and *In re Tong* (3) should apply here.

They also cited *In re Lamb* (4).

Roxburgh K.C. in reply. Apart from decisions there is nothing to bring in Schedule I., Part II., because all the obligations must be disposed of before the shares of residue can be ascertained. There is nothing in which the lapsed share can be affected by the Act.

Cur. adv. vult.

1940. Nov. 14. SCOTT L.J. I will ask Luxmoore L.J. to read the judgment of the Court.

LUXMOORE L.J. [after stating the facts set out above:] There can be no question but that if the testatrix had died before January 1, 1926, and Dr. Gibbons had predeceased her, the declaration for which the appellant contends would—assuming that there was no residuary real estate—have been applicable, and the plaintiff and appellant would have taken in equal shares, for on the law as it stood before January 1, 1926, there was no room for any question of construction, it being then well settled that in the absence of any contrary direction in the will, and whether the residuary personal estate was bequeathed subject to the payment of such items

(1) [1930] 1 Ch. 268.

(2) [1933] 1 Ch. 771.

(3) [1930] 2 Ch. 400; [1931] 1 Ch. 202.

(4) [1929] 1 Ch. 772.

or not, funeral testamentary and administration expenses, as well as legacies, were payable out of the general personal estate, and not primarily out of a lapsed share of residue: see *Trethewy* v. *Helyar* (1), *Fenton* v. *Wills* (2), and *Blann* v. *Bell* (3). If, however, the testatrix's residuary estate consisted of realty as well as personalty, then the various items referred to in the declaration would have been payable out of the residuary personalty in priority to the residuary realty, there being nothing in the will to place the realty on an equality with the personalty in respect of charge, and consequently, if the personalty had been sufficient for the purpose, the plaintiff would have taken the half of the balance remaining of the residuary personalty, after the discharge of the specified items, together with one half of the residuary realty, and the appellant would have taken the other half of the said balance of the residuary personalty, and the heir at law the other half of the residuary realty: see *Fisher* v. *Fisher* (4), *Wood* v. *Ordish* (5), and *Ryves* v. *Ryves* (6). In each case the interest of the plaintiff, the next of kin and the heir at law, as the case might be, would have been ascertained on the footing that the dispositions of the will were effective, the next of kin and heir at law taking precisely the same interest in the residuary personalty and residuary realty as Dr. Gibbons would have taken if he had not predeceased the testatrix. It is equally clear that in each of the hypothetical cases referred to the provisions of the testatrix's will would have effected a change in the established order of administration of assets before January 1, 1926, and that such change would have been effected by reason of the charge on the residuary personalty and realty resulting from the direction in the will that the gift of the residuary personalty and realty was to be "subject" to the payment of the debts and liabilities and other items specifically mentioned.

The present question has arisen owing to the alteration of the law by reason of the passing of the Administration of

(1) (1876) 4 Ch. D. 53.
(2) (1877) 7 Ch. D. 33.
(3) (1877) 7 Ch. D. 382.
(4) (1838) 2 Keen 610.
(5) (1855) 3 Sm. & G. 125.
(6) (1871) L. R. 11 Eq. 539.

Estates Act, 1925, which came into force on January 1, 1926. By s. 32 of that Act real and personal property are constituted assets for the payment of debts and liabilities and are placed on an equality with regard to the payment of debts, liabilities, funeral and testamentary and administration expenses and legacies, the primary liability of the personalty being thereby abolished. By s. 34, sub-s. 3, of that Act it is provided that: "Where the estate of a deceased person is solvent his real "and personal estate shall, subject to rules of court and "the provisions hereinafter contained as to charges on property "of the deceased, and to the provisions, if any, contained in his "will, be applicable towards the discharge of the funeral, "testamentary and administration expenses, debts and "liabilities payable thereout in the order mentioned in Part II. "of the First Schedule to this Act." Property is defined in s. 55 of the Act as including a thing in action and any interest in real or personal property. Part II. of the First Schedule to the Act is headed: "Order of Application of "Assets where the Estate is solvent." Para. 1 thereof provides that the first item of property to be applied in discharge of the various items mentioned is property of the deceased undisposed of by will subject to the retention thereout of a fund sufficient to meet pecuniary legacies; while para. 8 (*a*) thereof provides that the order of application may be varied by the will of the deceased. Since the testatrix died after the date when the Act came into force it is plain that regard must be had to the provisions thereof to which we have referred, for the will and the codicil confirming it must be construed as taking effect at the death of the testatrix.

Mr. Roxburgh on behalf of the appellant submitted that the first question which arises is whether on the true construction of para. 1 of Part II. of the First Schedule to the Act there is any property undisposed of by the will. He argued that to any person reading the will and codicil without knowledge of the fact that Dr. Gibbons predeceased the testatrix there would appear to be a complete disposition of the whole of her property, and that it is only when the fact of Dr. Gibbons's predecease is known to the reader that he

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is able to say that the disposition of the will in favour of Dr. Gibbons cannot be carried into effect and must pass to the testatrix's next of kin as if she, the testatrix, had died intestate. In order to define what is to pass as on an intestacy the share which Dr. Gibbons would have taken if he had not predeceased the testatrix must be ascertained in the same way as would have been the case if he had in fact survived her. So far as the testatrix's will is concerned there is a disposition in favour of Dr. Gibbons, but that disposition cannot take effect because the law provides for its lapse by reason of Dr. Gibbons's death in the testatrix's lifetime. Mr. Roxburgh frankly admitted that the argument is not open to him in this Court by reason of the decision in *In re Worthington* (1), approving the decision of Eve J. in *In re Lamb* (2); the point therefore was not further developed or argued. Plainly this Court is bound by the decision in *In re Worthington* (1) and must treat the interest given to Dr. Gibbons by the will as undisposed of by it within the true meaning of para. 1 of Part II. of the First Schedule to the Act.

The next question is whether there is any provision in the will and codicil of the testatrix, which prevents the application of the order of administration set out in Part II. of the First Schedule; for s. 34, sub-s. 3 provides that that order is only to apply subject, among other things, to the provisions of the will—while Part II. of the First Schedule further provides by para. 8 (*a*) already referred to that the order of administration thereby laid down may be varied by the will. It seems to us that there is no substantial difference between these two provisions. The direction in s. 34, sub-s. 3, that the order is only to apply subject to the provisions of the will means that the provisions of the will must be examined before it can be determined whether the order set out in Part II. of the First Schedule is to apply either in its entirety or with or without variations, while para. 8 of Part II. of the Schedule provides that if the order there set out is applicable the prescribed order may be varied in the manner directed by the will. This may be either by express provision or by implication. It is therefore necessary first to consider whether the will contains provisions which prevent the application of Part II. of the First Schedule. The will provides that "subject "to the payment" of the various items specified the testatrix devises and bequeathes "all the rest and residue of any "property of whatsoever kind or nature wheresoever situate "whether real or personal" to the two named persons in equal shares. Since the primary liability of personal estate before real estate has been removed by s. 32 of the Act and realty and personalty are thereby placed on an equality, it follows that the provision referred to imposes a charge on the residuary personal and real estates in respect of the items specified in such a way that those items must be borne by those estates rateably as between the persons beneficially entitled thereto. The presence of that charge is inconsistent with the payment of the items specified out of the lapsed share of the residuary personal and real estates, since that share can only be ascertained after effect has been given to the charge imposed by the will. As already pointed out, the imposition of such a charge was held to be sufficient to effect a change in the order of administration applicable before the Act in question came into force, and we can see no valid reason why such a charge should not be sufficient to effect a change in the order of administration laid down in Part II. of the First Schedule, and in the absence of any such reason we should have had no hestitation, apart from any binding decision to the contrary, in holding that the provisions of para. 1 of Part II. of the First Schedule to the Act have no application to the administration of the testatrix's estate.

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(1) [1933] 1 Ch. 771.

(2) [1929] 1 Ch. 722.

There have, however, been a number of decisions with regard to the application or otherwise of Part II. of the First Schedule to the Act to the administration of particular estates. Our attention was called to the majority of these decisions which have recently been reviewed by Simonds J. in *In re Sanger* (1). Simonds J. stated that he found it difficult to distinguish between, on the one hand, a gift of property subject to and after payment of funeral and testamentary expenses or debts or legacies and, on the other hand, a direction to pay funeral and testamentary expenses or debts or legacies followed by a gift of residue—and we feel some sympathy with him in his difficulty. It seems to us, however, that the two classes of cases may properly be distinguished on the ground that in the first class of case there is an express charge of the specified items upon the subject-matter of the gift, while in the other class there is merely a direction to pay the specified items unsupported by any charge express or to be implied. In *In re Kempthorne* (1) the provision which was held to displace the order of administration laid down by Part II. of the First Schedule to the Act was in the following terms: "As to all "my leasehold property and all my personal estate and effects "including my stocks and shares and all money due to me on "debentures and mortgages of or to which I shall be possessed "or entitled at the time of my death subject to and after "payment of my funeral and testamentary expenses and debts "and the legacies bequeathed by this my will or any codicil "thereto and the duty on any legacies bequeathed free of duty "the same shall be divided into seven equal parts and I "bequeath the same as follows." Then follow the names of certain beneficiaries, some of whom predeceased the testator with the result that there was a lapse in respect of the shares given to them. The crucial words in that will were "subject "to and after payment of my funeral and testamentary "expenses," etc. In the present case the crucial words appear to be "subject to the payment of my funeral and testamentary "expenses," etc. We feel unable to distinguish the words in *In re Kempthorne* (1) from those in the present case. The only difference is that in the former case the words "and after" are used in addition to the words "subject to," while in the present case the words "subject to" appear alone. Even if we had felt any doubt as to the decision in *In re Kempthorne* (1) we are satisfied that the difference between the words to be compared is so insignificant that we should have been bound to follow that decision, but we do not feel any such doubt; on the contrary we respectfully agree with that decision and

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(1) [1939] 1 Ch. 238.

(1) [1930] 1 Ch. 268.

follow it without hesitation. Of the other cases referred to in *In re Sanger* (1) it is sufficient to state that in *In re Lamb* (2), in *In re Tong* (3), and in *In re Worthington* (4) there were no words which could be construed as creating a charge of the particular items respectively in question on the residuary estate or any other property of the testator, while both in *In re Petty* (5), and in *In re Atkinson* (6), as in *In re Kempthorne* (7) such words of charge were present. It appears to us that *In re Sanger* (1) falls into the same class as *In re Lamb* (2), *In re Tong* (3) and *In re Worthington* (4).

For these reasons we are unable to agree with the decision of Farwell J. in the present case, and are of opinion that the declaration made by him should be varied by striking out the declaration set out therein under heading (*b*), and substituting therefor the following declaration, namely, (*b*) that the funeral testamentary and administration expenses and debts of the testatrix (including therein the debts and liabilities of the business of William Harland & Son), and the pecuniary legacies bequeathed by her will and codicil and the legacy duty on legacies bequeathed by her said will free of duty, ought to be paid and discharged out of the entire residuary estate of the testatrix, and that no part of the share of residue given by the will of the testatrix to Dr. Gibbons, who predeceased the testatrix, ought to be applied in recouping to the plaintiff any part of the said funeral testamentary and administration expenses debts pecuniary legacies or legacy duty.

With regard to the costs in the Court below we think that the order made by Farwell J. ought not to be disturbed, and that a similar order to that order should be made in respect of the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: *M. Wilson Prentis, for Vaughan & Baker, Kington, Herefordshire.*

Solicitors for the respondent: *Lewis & Lewis.*

(1) [1939] 1 Ch. 238.
(2) [1929] 1 Ch. 722.
(3) [1930] 2 Ch. 400.
(4) [1933] 1 Ch. 771.
(5) [1929] 1 Ch. 726.
(6) [1930] 1 Ch. 47.
(7) [1930] 1 Ch. 268.

P. J. B.

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1941
Jan. 15.

MASTAKA v. MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED.

Family provision—Mother and daughter—No ordinary relationship during mother's lifetime—No financial help then sought by daughter—Daughter's claim for maintenance—Evidence—Domicil of mother at death—Inheritance (Family Provision) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 45), *s.* 1.

The testatrix, who died in 1939, married in England in 1920 a foreigner from whom she shortly afterwards separated and about whose subsequent life and domicil nothing was known. By her will she made no provision for her dauger, the child of the marriage, born in 1920, who had lived from infancy at the charge of another person and under her care, and had accepted a relationship of friendship and no more with her mother, never attempting to obtain financial assistance from her. In 1940 the daughter made an application for maintenance out of the estate of the testatrix under the Inheritance (Family Provision) Act, 1938 :—

Held, that s. 1, sub-s. 1, of the Act required the applicant to prove that the testatrix died domiciled in England and that in the absence of evidence as to the domicil of her husband, which must be hers, the Court could not make an order for maintenance.

Held, further, that as the daughter had acquiesced in a state of affairs in which the ordinary relationship of mother and daughter did not exist, this was not a proper case for the Court to make such an order.

ADJOURNED SUMMONS.

On January 24, 1920, Elizabeth Isabel White (hereinafter called "the mother") married Jonas Mastaka, a Russian Jew (hereinafter called "the father"), at the Holborn Registry Office. Shortly afterwards they separated and it was not known where the father subsequently lived or whether he was still alive. Accordingly no evidence was available as to his domicil.

On March 19, 1920, Joan Mastaka (hereinafter called "the daughter") was born. The mother left her as a baby in the care of Teresa Ward, a married woman, in whose house she grew up, and for about five years, but no longer, paid 15*s.* a week towards her maintenance. The daughter, although she saw the mother from time to time, never attempted to obtain any financial assistance from her, accepting a relationship between them of friendship and no more. At one time the mother, who was living with a man not her husband, invited the daughter to make her home with them but, on the advice of Teresa Ward, she declined the offer. The daughter suffered from a deformity of the hip which, though it disabled her from doing certain kinds of work, did not completely prevent her from earning a living.

On October 7, 1939, the mother died. By her will dated August 4, 1939, she made bequests to certain persons but made no provision for the daughter. Her estate was valued for probate at 1489*l.* 18*s.* gross. On February 23, 1940, the daughter took out a summons under the Inheritance (Family Provision) Act, 1939, claiming that the executors, the Midland Bank Executor and Trustee Co., Ld., should make reasonable provision for her out of the estate.

A. S. Diamond for the applicant. The testatrix was married and lived all her life in England and her husband may have continued to reside in this country. There is no direct evidence that she was not domiciled here at her death.

This case comes within the Act and, having regard to the mother's obligations to her daughter, who suffered from a physical disability, an order for maintenance should be made.

Lindsay M. Jopling for the respondents. Under s. 1, sub-s. 1, of the Act, the applicant must prove that the domicil of the testatrix at the date of her death was English. She has not done so, as there is no evidence relating to the domicil of her husband, who was a Russian, and thus there is no evidence that the testatrix was herself domiciled in England.

Further, this is not in any event a proper case for a claim for maintenance as the applicant had been content to live with Teresa Ward, treating the relationship of mother and daughter as non-existent.

FARWELL J. [having stated the facts :] There is more than one answer to this application. First, the opening

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words of s. 1, sub-s. 1, of the Inheritance (Family Provision) Act, 1938, are: "Where, after the commencement of this Act, "a person dies domiciled in England leaving . . . . a daughter " . . . ." That provision requires an applicant to prove that the person in question died domiciled in England. In the present case it appears that the testatrix married a man who was a Russian but was in this country at the time of the marriage in 1920. The parties separated, and nobody knows whether he is still alive, or, if so, where he is, or what his domicil is or was during the period before the death of the testatrix. It may be that he acquired a domicil in this country. On the other hand, if he left England and did not acquire a domicil here, then his foreign domicil would be likewise that of his wife. It is, in my judgment, essential for an applicant to prove that the deceased was domiciled in England at the date of the death. That evidence is not forthcoming in this case. No doubt there is no direct evidence to the contrary, but the circumstances make it necessary for evidence of domicil to be given by the applicant before the Court can obtain the assistance for which she asks. The evidence tendered leaves the matter completely at large. It is true that the testatrix lived in this country all her life, and it may be that her husband did so too, so that they both had an English domicil, but that is not proved, and in the absence of such evidence, it is not open to me to make any order for maintenance in the present case.

Apart from that altogether, even if it were open to me to make an order, I should not feel inclined to do so. This is a very unusual case, in that the testatrix as from the time when the daughter was five years old, made no contribution towards her maintenance, and Mrs. Ward, the lady with whom the child was living, seems to have required no such contribution from her. The applicant herself apparently never made any attempt to obtain assistance from the testatrix, and was content to allow things to proceed on the footing that the ordinary relationship of mother and daughter never really existed and that there was nothing more than friendship between them. The mother might well have taken the view

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in all the circumstances, that whatever obligation she might have been under when the child was born, she was not bound to provide for her by her will, having regard to the fact that she was quite content to live with Mrs. Ward, and might be in a position to earn her own living notwithstanding her physical disability.

In the circumstances, I think that this application must be dismissed with costs.

Solicitors: *H. R. Thomas; Douglass & Weaver.*

F. C.

FARWELL J.

1941
Jan. 22.

In re HURD. *In re* CURRY.

STOTT *v.* STOTT.

Will—Bequest to child—Testatrix predeceased in 1923 *by child leaving issue—Issue living at death of testatrix in* 1939*—Child of issue born out of wedlock—Subsequent legitimation—Right of legitimated child to take—Wills Act,* 1837 (7 *Will.* 4 *and* 1 *Vict. c.* 26), *s.* 33*—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23).

By s. 33 of the Wills Act, 1837: "Where any person, being "a child or other issue of the testator, to whom any real or "personal estate shall be devised or bequeathed for any estate "or interest not determinable at or before the death of such "person, shall die in the lifetime of the testator leaving issue, "and any such issue of such person shall be living at the time of "the death of the testator, such devise or bequest shall not lapse, "but shall take effect as if the death of such person had happened "immediately after the death of the testator; unless a contrary "intention shall appear by the will."

A testatrix by her will made in January, 1923, left a share of residue to one of her daughters. The daughter died intestate in September, 1923, leaving her husband and three daughters, one of whom had been born out of wedlock and afterwards legitimated under the Legitimacy Act, 1926. The testatrix died in April, 1939, leaving six children and survived also by the three granddaughters.

On a summons to determine (inter alia) whether in view of s. 33 and of the daughter's death in 1923, her share of residue was to be distributed in accordance with the law in force before 1926 (in which case the legitimated granddaughter would not take) or in accordance with the Administration of Estates Act, 1925 (in which case she would):—

Held, that s. 33 applies only to prevent lapse. It does not alter the way in which the estate of the person predeceasing the testator is to be administered. It simply increases that estate, and does not alter the persons entitled to it under the law in force at the death of the person predeceasing the testator.

Thus, in the present case, although the daughter, for the purpose of preventing lapse, was to be deemed to have died in 1939, immediately after the testatrix, the gift became part of her estate, to be administered under the law in force at the date of her death in 1923.

ADJOURNED SUMMONS.

This summons was taken out by the sole executor of the will, dated January 30, 1923, of Mrs. Anna Hurd (hereinafter called "the testatrix"), who died on April 18, 1939, for the determination of questions arising on the administration of the estate of her daughter, Mrs. Sarah Giblett Curry (hereinafter called "Sarah"), who died intestate, survived by her husband and three daughters, on September 20, 1923. The summons was intituled in the matter of both estates. The only question covered by this report concerned the operation of s. 33 of the Wills Act, 1837.

Clause 5 of the will provided: "I give devise and bequeath "all the rest of my property, ... to my executor upon "trust to sell and divide the same as fairly as he can between "my daughter Sarah Giblett Stott and the three younger ones, "first giving to Sarah any land which belonged to their father."

Of the nine defendants to the summons, the matter here reported interested only four, namely, Sarah's husband and her three daughters, the granddaughters of the testatrix, one of whom, born out of wedlock, was afterwards legitimated by the Legitimacy Act, 1926.

The summons was taken out on August 28, 1940, and asked (inter alia) whether, having regard to s. 33 of the Wills Act, 1837, and to Sarah's death intestate in 1923, Sarah's share of the residue was distributable under the law in force before 1926 (in which case the legitimated granddaughter would not take), or with the Administration of Estates Act, 1925 (in which case she would).

Raymond Jennings for the summons.

Richmount for the legitimated granddaughter and others interested. From s. 33 it is clear that, in such a case as the present, the Administration of Estates Act, 1925, applies. The section is quite plain. Sarah is to be deemed for all purposes to have died immediately after the testatrix, namely, on April 18, 1939. It follows that, although her estate must be administered under the law in force before 1926, her share of the residue is governed by the Administration of Estates Act, 1925.

J. A. Reid for one of the three granddaughters who was an infant. Sect. 33 provides that the "devise or bequest "shall take effect as if the death of such person had happened "immediately after the death of the testator." The purpose of the section is to make the legacy become part of the legatee's estate. When the section has done that, it is spent. It means that for the purpose of determining what is to happen to the legacy, and for that purpose only, the death of the person dying before the testator is to be deemed to have taken place immediately after that of the testator. The section does not affect devolution, which must be in accordance with the law in force at the real date of the death of the person predeceasing the testator.

FARWELL J. In this case the testatrix by her will gave to her daughter Sarah a share in the residue in addition to lands which had belonged to her father. Sarah predeceased the testatrix, but she had issue living at the death of the testatrix. Sect. 33 of the Wills Act, 1837, therefore applies, and she must be treated for the purpose of that section as having died immediately after the death of the testatrix, and the gift to her therefore takes effect. That raises this question: Sarah died intestate in 1923 and on her death the law applicable to the administration of the estates of intestates was that in force before the Administration of Estates Act, 1925. The testatrix died in 1939. The Administration of Estates Act, 1925, was then in force. It altered the administration of intestates' estates, and it has been argued before me that, although Sarah's estate would necessarily be administered and divided among those entitled to it under the law in force before 1925, the effect of s. 33 of the Wills Act, 1837, is that the gift given by the testatrix must be administered in accordance with the law as it has been since 1925. Sect. 33 of the Wills Act, 1837, provides that the gift is not to lapse, but is to take effect as if the death of the legatee had happened immediately after the death of the testator. If those words be taken literally, it must, in the present case, be assumed that Sarah died in 1939, immediately after the death of the testatrix, from which it seems to follow that the legacy given to her shall be administered according to the law then in force. In my judgment, however, that is not the true effect of this section: its object and effect is to prevent lapse, and its result is that the gift, instead of lapsing, becomes part of the estate of the deceased person, on the footing that the legatee was alive at the death of the testatrix and was therefore a person to whom a legacy could be given. That result, however, does not, in my judgment, alter the position that, although Sarah is deemed, for the purpose of making this gift effective, to have been living in 1939, the share which she takes under the gift becomes none the less a part of her estate and must be administered as part of her estate in accordance with the law in force at the date of her death in 1923. Obvious difficulties might arise were not that the true effect of the section. For instance, if a person died intestate before 1925 and it became necessary to inquire who were the next of kin and an inquiry was ordered, the whole matter was investigated, and the Master's certificate made finding who were the intestate's next of kin, if subsequently the estate is increased by a legacy given by a person who died after 1925 and saved from lapse by s. 33, if the legacy is to be administered in accordance with the law after 1925, a further inquiry as to the next of kin will be necessary on the footing that the intestate's death took place long after it actually did, and different persons may become entitled.

On the whole I have come to the conclusion that that section applies only to the prevention of lapse. It is intended only to prevent the gift from not taking effect, and the result is that a gift which would otherwise have lapsed passes to the legal personal representative, who takes it as part of the estate to be administered in accordance with the law applicable to that estate. The Wills Act, 1837, does not, in my judgment, so apply as to alter the way in which the estate should be administered. It operates only to increase that estate and does not alter the persons entitled to it under the law in force at the intestate's death.

Solicitors for all parties: *Stileman, Neate & Topping, for Harris & Harris, Wells, Somerset.*

K. R. A. H.

FARWELL
J.

1941
Feb. 6.

In re JOSLIN.

JOSLIN *v.* MURCH.

Family Provision—Wife disinherited—Bequest to another woman by whom testator had two children—Application by widow for maintenance out of testator's estate—Net estate very small—Whether application well founded—Inheritance (Family Provision) Act, 1938 (1 & 2 *Geo.* 6, *c.* 45), *s.* 1.

A testator, by his will, made no provision out of a very small estate for his widow, who had a small income of her own, but bequeathed his residuary estate on trust for the benefit of another woman and two children borne to him by her. This woman and the children were penniless. The widow took out a summons under the Inheritance (Family Provision) Act, 1938, in which she asked for an order that reasonable provision for her maintenance should be made out of the estate:—

Held, that, in the circumstances, the application ought not to have been made; that it was right, so far as possible, to prevent the very small provision made for the woman and her two children from being reduced as a result of these proceedings; and that the summons must therefore be dismissed with costs.

ADJOURNED SUMMONS.

In 1915 the testator married the applicant in these proceedings and there was one child of the marriage, who died in 1923. The testator and the applicant lived together happily for some years and she assisted him with money from time to time. In 1934 he commenced an association with a married woman, who was subsequently divorced, and, as a result of that association, two children were born. A deed of separation was entered into between the testator and the applicant, under which he became liable to pay her 1*l.* a week during their joint lives. He died in November, 1939.

By his will, dated February 11, 1938, he devised and bequeathed to the executors and trustees thereof all his real and personal estate on trust to pay his funeral and testamentary expenses and debts and to invest the residue and pay the income thereof to the woman with whom he had associated and after her death or remarriage to hold the residuary trust fund for her two children on the trusts therein mentioned. The testator's estate was valued at approximately 370*l.* The testator's widow took out a summons asking that the Court should, under the Inheritance (Family Provision) Act, 1938, order reasonable provision for her maintenance to be made out of his estate and that the costs of the application should be paid out of the estate or otherwise as to the Court should seem just.

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Lightman for the applicant. The widow has an income from three cottages amounting to approximately 23*l.* per annum. She also obtains 3*l.* 4*s.* a week from three boarders. The facts of this case are different from those in *In re Vrint* (1). In that case the value of the estate was approximately only 138*l.*

J. V. Nesbitt for the executors.

Beebee for the mother and the two infant children. This respondent lived with the testator as his wife and has two children to maintain. The widow has no children to maintain. The testator was morally bound to provide for this woman. who was living on poor relief, and for his two children, if he was in a position to do so. His widow was free from pecuniary difficulties. Applications of this kind, the costs of which, if they fell on the estate, would diminish its value considerably, ought to be discouraged. This is not a suitable application for the Court to be asked to grant, as the applicant is receiving over 3*l.* 10*s.* weekly.

Lightman in reply.

FARWELL J. [after stating the facts, continued :] The estate, so far as at present ascertained, is a very small one ; its value being a little over 370*l.* By reason of her husband's death the wife has lost 1*l.* a week, to which she was entitled under the separation deed, but she has a small income of her own which she derives partly from property and partly from what she earns by taking boarders. It is quite true that her total income is very small and she could, no doubt, well do with an addition to it. With regard to the woman with whom

(1) [1940] 1 Ch. 920.

the testator lived and by whom he had two children, the position is that she and they are completely penniless and in receipt of assistance under the Poor Law.

In these circumstances the testator was in a dilemma. He owed a duty to his wife, who had lived with him for many years, who had had a child by him, and who had apparently assisted him with money from time to time; and no doubt he treated her badly when he left her and went to live with another woman. On the other hand, he was under a moral, if not a legal, obligation to make provision for his two children, who were none the less his children because they were born out of wedlock, and for the woman who had borne those children.

In cases under this Act the Court has, in my view, to consider moral as well as legal obligations and, in my judgment, in a case of this sort, a testator is not only entitled, but is bound, to consider how far there lies a duty on him—(it may be a moral duty)—to make provision for the children whom he has brought into this world and for the woman who has borne those children. On the other hand, he has to take into consideration the duty which he owes to the woman who was his wife and who, as in the present case, had been through many vicissitudes with him and assisted him from time to time.

I do not think that that is an easy dilemma for a man to face, but in such a case, in my judgment, if the estate is so small that it is not practically possible to provide both for the wife and for the other woman and the children, and there is some provision already in existence for the wife, it is open to the testator to say: "Having regard to all the circumstances, the duty lies on me to make what little provision "I can for the woman and the children, although it means "that I must leave my lawful wife to continue to exist on what "little she has—a small income which will enable her to live "in a very small way; otherwise the other woman and the "two children will be left penniless." That is what this testator has elected to do.

It is said that the Court ought to upset what the

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JOSLIN, *In re.* JOSLIN *v.* MURCH

testator has done and to deprive the woman and the two children of some, if not all, of the very small provision that there is for them, in order that some further provision, other than what she has, may be made for the lawful wife.

The jurisdiction under this Act is one which it is extremely difficult for the Court to administer. It is in each case a matter of discretion (a discretion which the Court must exercise judicially) and, in my judgment, this is not a case where the discretion of the Court ought to be exercised in favour of the plaintiff. The application is one which the plaintiff has chosen to make: it has been unsuccessful and, in my view, it is one which, in all the circumstances, ought not to have been made.

I think, therefore, that it is right, so far as I can, to prevent the very small provision made for the woman and the children from being reduced as a result of these proceedings, and I shall therefore dismiss the summons with costs.

Solicitors: *Arnold Carter & Co., for Dunn & Baker, Exeter; Torr & Co., for Toller, Oerton & Balsdon, Barnstaple.*

J. L. D.

FARWELL J.

1941

Feb. 17.

In re MYLNE.

POTTER *v.* DOW.

Charity—Charitable bequest—Gift for advancement of religion—Benefit of evangelistic workers including retired or acting missionaries—Eligible only if " Protestant . . . . and whole " hearted believer in Deity of Christ and full inspiration of Scripture "—Duty of trustees.

A testatrix directed her trustees (inter alia) to apply her residue " for the benefit of . . . . persons . . . . who are or have been " engaged in evangelistic work including retired missionaries or " missionaries still engaged as such or continuing Christian workers " of any other description as my trustees in their absolute " discretion shall from time to time select . . . . but so that no " person shall be eligible for any benefit under this trust unless " he or she shall be a Protestant in religion and a whole hearted " believer in the Deity of Christ and the full inspiration of " Scripture."

Held, that the direction created a valid charitable trust because, although its intended beneficiaries included retired missionaries, it was nevertheless for the advancement of religion, since a gift for retired missionaries may well encourage missionary work.

The limiting of the scope of the trust to protestants wholeheartedly believing in the Deity of Christ and the full inspiration of Scripture was more than the expression of a wish. It made those beliefs essential in beneficiaries. The case differed from cases of forfeiture clauses, in wills, operating on marriage with persons not of a particular faith. Those forfeiture clauses must be strictly construed and the Court cannot ascertain, for the purpose of construing them, whether persons are or are not " of " a particular faith, which is a matter of the state of the mind.

In the case before the Court, however, the trustees could without difficulty ascertain whether they were carrying out the wishes of the testatrix. The intended beneficiaries were missionaries and other Christian workers, and the trustees could easily ascertain, by diligent inquiry into their records as missionaries and workers, whether they were protestants whole heartedly believing in the Deity of Christ and the full inspiration of Scripture and so would properly be beneficiaries. All that the trustees had to do was to select honestly and with due care.

In re Blaiberg. Blaiberg v. *de Andia Yrarrazaval and Blaiberg* [1940] Ch. 385; and *In re Blaiberg's Will Trusts. Hyman* v. *Blaiberg* [1940] Ch. 386, 389 et seq., distinguished.

ADJOURNED SUMMONS.

By her will dated February 29, 1940, Miss Jessy Louisa Mylne (hereinafter called " the testatrix ") directed in clause 11 that her trustees should apply the residue of her residuary trust fund and the whole of the income thereof "for the benefit of such "persons, of either sex, and who are, or have been, engaged in "evangelistic work, including retired missionaries, or missionaries "still engaged as such, or continuing Christian workers of any "other description as my trustees in their absolute discretion shall "from time to time select. It is my wish but without imposing "any trust that preference shall be given to such persons as "may be residing in Guildford and the neighbouring district "but so that no person shall be eligible for any benefit under "this trust unless he or she shall be a Protestant in religion "and a whole hearted believer in the Deity of Christ and the "full inspiration of Scripture."

The testatrix died on March 3, 1940, and the will, with a codicil, was proved on June 5, 1940.

By this summons the trustees asked (inter alia) whether a valid and effective charitable gift was constituted by the directions to apply the residue in accordance with the terms of clause 11.

H. A. Rose for the trustees.

Lindsay M. Jopling for a pecuniary legatee.

W. G. Hart for a pecuniary legatee.

Gravenor Hewins for the next of kin. This direction cannot create a valid and effective charitable trust. Its particular purpose must fail for uncertainty. The words "but "so that no person shall be eligible . . . . unless he or she "shall be a Protestant in religion and a whole hearted believer "in the Deity of Christ and the full inspiration of Scripture", make those states of mind an essential qualification in every beneficiary, and the trustees have no power to vary that qualification. Therefore, as a state of mind is something which cannot be ascertained with certainty by the Court, the trustees, or anybody else, the direction cannot create a valid and effective charitable trust: *In re Blaiberg* (1); *In re Blaiberg's Will Trusts* (2).

H. O. Danckwerts for the Attorney-General. Quite apart

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(1) [1940] Ch. 385. decided December 14, 1938;

(2) Not separately reported: see [1940] Ch. 386, 389, et seq.

FARWELL J.

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MYLNE, *In re.*

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from any question of the direction failing for uncertainty, *In re Blaiberg* (1) and *In re Blaiberg's Will Trusts* (2) do not apply to the present case. In these cases the Court was considering a forfeiture clause in a will. Forfeiture clauses are drastic in their operation, and must be construed with great strictness: and in those cases, where the clause was to operate against certain persons marrying persons not "of the "Jewish faith" the Court held itself unable to ascertain whether people were or were not "of the Jewish faith," since religious belief is entirely a matter of the state of a person's mind.

In the present case, however, there is no such difficulty. First, the scope of the trust (and, therefore, the selective discretion of the trustees) is limited to missionaries, whether working or retired, and other Christian workers: and secondly, the trustees can get a sufficiently accurate idea of the beliefs of persons of that status by examining available records of their vocational activities, such as preaching and social work.

The direction, therefore, does create a valid and effective charitable trust, and the trustees can therefore deal with these moneys in accordance with the wishes of the testatrix as indicated.

FARWELL J. It has occurred to me that the provision in clause 11 might be treated as a special power of appointment to the trustees among a limited class of persons indicated in the clause. I think that it is possible to place that interpretation on the language. I have, however, come to the conclusion that it is not necessary to decide this question on that ground. My reason for that conclusion is that, in my judgment, clause 11 does create a valid charitable trust, not as being for the assistance of poverty, because there is not enough to suggest that any degree of poverty is necessary, but as being for the advancement of religion. The fact that the gift is for the benefit of, among others, "retired" missionaries, does not prevent its being a gift for the advancement of religion, for it may well be that a gift providing

(1) [1940] Ch. 385.

(2) Not separately reported: decided December 14, 1938; see [1940] Ch. 386, 389, et seq.

for "retired" missionaries may encourage people to take up missionary work. The gift is, therefore, a good charitable gift, its objects being, among others, retired missionaries or acting missionaries, subject to certain conditions.

These conditions raise a difficulty. The testatrix provides in clause 11: "It is my wish but without imposing any trust "that preference shall be given to such persons as may be "residing in Guildford and the neighbouring district . . . ." That imposes no trust whatever on the trustees. She continues, in the same clause: "but so that no person shall be eligible "for any benefit under this trust unless he or she shall be a "Protestant in religion and a whole hearted believer in the "Deity of Christ and the full inspiration of Scripture."

That seems to me to be, not merely the expression of a wish, but an indication that, in order to be eligible for benefit under this trust, a person must be correctly describable as "a Protestant in religion and a whole hearted believer in the "Deity of Christ and the full inspiration of Scripture." It has been argued before me that Protestantism and belief in the Deity of Christ and the inspiration of Scripture are qualities which it is impossible for the trustees, the Court, or anybody else to ascertain: and in support of that submission, the decision of Morton J. in *In re Blaiberg* (1) and my own decision in *In re Blaiberg's Will Trusts* (2) have been relied on. In that case a codicil provided for forfeiture should any child or grandchild of the testator marry any person "not of the Jewish faith."

In my judgment the decisions in those cases are not in point in the present case. A condition on which a person forfeits an interest must be construed strictly, and in the case then before me I took the view that the Court cannot ascertain whether a person is or is not "of the Jewish faith." That is a matter of the state of a person's mind. In the present case, however, the classes of persons to be benefited include "retired "missionaries or missionaries still engaged as such or continuing "Christian workers of any other description" and it is not

(1) [1940] Ch. 385.

(2) Not separately reported: decided December 14, 1938; see [1940] Ch. 386, 389, et seq.

impossible for the trustees to ascertain whether they are giving effect to the wishes of the testatrix, if they make inquiries as to the preaching and other work of proposed recipients of benefits under the trust and so ascertain whether they are Protestants and whole hearted believers in the Deity of Christ and in the full inspiration of Scripture. In my judgment the trustees can thus ascertain whether a person is or is not eligible for benefit. They can ascertain by inquiry whether a particular person does or does not comply with the conditions and whether in a particular case they can or cannot properly apply a part of this fund to that person's benefit. The case is entirely different from cases of a forfeiture clause.

In the present case, what the trustees have to do is to make a selection among certain classes of persons and to ascertain whether those whom they wish to benefit comply with the conditions. So long as the trustees satisfy themselves that those whom they select comply with the conditions, nobody can raise any objection. If they were to select a professed atheist it may well be that the Attorney-General could intervene and take steps to prevent such a selection being acted upon. If, however, they make their selection honestly and with due care, it does not seem to me that anyone can complain.

I come, therefore, to the conclusion that the direction contained in clause 11 of the will constitutes a valid and effective charitable gift, and I will make a declaration accordingly.

Solicitors: *Johnson, Weatherall, Sturt & Hardy, for Potter, Crundwell & Bridge, Farnham*; *Ford, Harris & Co.*; *Rivington & Son*; *Treasury Solicitor.*

K. R. A. H.

In re GALE.

GALE *v.* GALE.

FARWELL J.

1941

Feb. 18.

Will—Trust for benefit of woman "during widowhood"—Beneficiary not widow of testator and in fact a spinster—Validity.

A testator devised a house to his trustees on trust to allow L. the use and enjoyment of it "during her widowhood," and also directed them to pay to her 1*l*. 5*s*. a week "during her widowhood for a period of 12 years." L. was not his widow and had in fact never married.

Held, that the devise and direction constituted a gift to a person for a period which, in fact, never could exist at all. That period had to begin with something which could never happen, namely, the exact moment at which L. became the widow of the testator. There never could be any period during which she was or had been his widow. She was, therefore, not entitled either to the interest in the house or to the weekly payments.

In re Boddington (1883) 22 Ch. D. 597; (1884) 25 Ch. D. 685 followed.

ADJOURNED SUMMONS.

By his will, dated March 11, 1938, George Henry Gale (hereinafter called "the testator") devised a house to his trustees on trust to allow Dorothy Marie Laing the use and enjoyment of it "during her widowhood," and also directed them to pay to her 1*l*. 5*s*. a week "during her widowhood for a "period of twelve years." He directed further, that, whenever those payments ceased to be payable, they, and the investments out of which they were made, should fall into and form part of his residuary trust fund and be divisible accordingly. The testator died on December 4, 1938. Dorothy Marie Laing was not his widow, and had in fact never married.

By this summons one of the trustees asked whether Dorothy Marie Laing, inasmuch as she was not a widow and never had been, was entitled to the use and enjoyment of the house and to the payments: if so, for how long; and, if she was not entitled to the payments at all, or was so for a limited period only, whether the sums not so paid to her were payable for life to the testator's widow (who, under the will, received two pounds a week for life out of the testator's residuary trust fund) or became part of his residuary trust fund. The summons asked, also, under s. 61 of the Trustee Act, 1925, that the trustees, should they have committed any breaches of trust by allowing Dorothy Marie Laing the use and enjoyment of the house, or by making the payments to her, might be relieved of all liability.

E. Russell Gurney for the summons.

J. A. Wolfe (for *Milner Holland*, on war service), for the widow and children. This gift fails, as it is a gift for a period which never comes into existence: *In re Boddington* (1). Here the governing word is "widowhood." The gift is not to begin until the widowhood of Dorothy Mary Laing, and is to end when her widowhood ceases.

D. A. Fairweather for Dorothy Marie Laing. The whole point of the case lies in the description of Dorothy Mary Laing as a "widow," and the Court must determine what "widowhood" means. To do that, the Court must have evidence of what the testator meant. Obviously, he intended to support Dorothy Marie Laing until such time as she should take a husband. "Widowhood" is a state determinable on death or marriage. In the circumstances, the provision in the present case with regard to re-marriage must be void as being in general restraint of marriage.

There is authority for the proposition that, where there has been an obvious misdescription, the Court must see whether there has been a fraud: *Attorney-General* v. *Kerr* (2). In the present case there has been no fraud, so it is a matter of what the testator intended: *In re Howard* (3). Dorothy Marie Laing ought to have the use and enjoyment of the house during her life, and to receive the weekly payments for twelve years.

FARWELL J. The testator, George Henry Gale, made his will on March 11, 1938, and died on December 4, 1938. When making his will he had it in mind to make some provision both for his wife and for Dorothy Marie Laing, who was not his wife. He appointed executors and trustees, and then

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(1) (1883) 22 Ch. D. 597; (1884) 25 Ch. D. 685.
(2) (1840) 2 Beav. 240; 9 L. J. (N. S.) (Ch.) 190.
(3) [1901] 1 Ch. 412.

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directed as follows: "I give devise and bequeath all that my "dwellinghouse and premises situate and being No. 8 Talbot "Gardens aforesaid together with all the furniture plate linen "china glass books prints pictures and all other my household "effects in and about the said dwellinghouse at the time of "my decease unto my trustees upon trust that my trustees "shall allow my wife to have the use and enjoyment thereof "during her life she nevertheless paying all rates and taxes ". . . ." The will continues: "I give and devise all that "the dwellinghouse situate and being No. 38 West Mount "Street Beeston in the City of Leeds to my trustees in trust "to allow Dorothy Marie Laing of that address to have the "use and enjoyment thereof during her widowhood she nevertheless paying all rates and taxes (except insurance) payable "in respect of the said dwellinghouse . . . ." Then the will proceeds "I give devise and bequeath all the residue of my "estate both real and personal . . . . unto my trustees . . . ." —then follow the usual trusts for sale, conversion and payment of testamentary expenses and debts—"and upon trust "to pay out of the income of my residuary trust fund to my "said wife the sum of two pounds per week during her life "and subject thereto to pay to the said Dorothy Marie Laing "the sum of one pound five shillings per week during her "widowhood for a period of twelve years and to pay the "balance (if any) of such income to my said wife during her "life provided always and I hereby declare that from and "after the death of my said wife my trustees shall sell my "said dwellinghouse No. 8 Talbot Gardens and my said "furniture (but with power at their discretion to postpone "such sale and conversion) and the proceeds of such sale and "conversion shall fall into and form part of my residuary "trust fund and subject to the said weekly payment of one "pound five shillings per week to the said Dorothy Marie "Laing I direct my trustees to pay and divide such residuary "trust fund together with any accumulated income thereof "unto and equally between my three children the said Doris "Grant Harold Gale and George Stanley Gale." Then there is a proviso "that whenever the payment to the said Dorothy

"Marie Laing of the said sum of one pound five shillings per "week shall cease to be payable then the same and the investments out of which such income is payable shall fall into "and form part of my residuary trust fund and be divisible "accordingly." Then there are certain other provisions which I need not read.

There is no doubt of the facts in this case and the lady who is not the wife has made an affidavit in which she has stated quite frankly the position between herself and the testator. She says: "I am a spinster of 46 years of age. I have four "children and I am known in the district where I live as Mrs. "Laing. I have fostered the belief that I am a married woman "for the sake of my children." Then she says that the testator had known her since she was about 20 years of age, when she was employed by him at a picture house which he owned; that she became intimate with him, that he was the father of her children and that he knew that she had in fact never married. Then she makes certain observations with regard to a house in which she lived in Leeds which I do not think I need read. On the evidence there is no question whatever that Dorothy Marie Laing was not the wife of the testator: in fact, the testator had a wife who survived him and for whom he made provision by his will.

The question that arises is, does Dorothy Marie Laing take any benefit at all under the will, having regard to the facts that the benefit given to her in respect of the house in Leeds is "the use and enjoyment thereof during her widowhood" and that the payment of 1*l.* 5*s.* per week is "during her "widowhood for a period of twelve years"? It is said that neither of those gifts can take effect because the period named in the will is "during her widowhood"; and that that is a period which has never come into existence, she never having been married.

I have been referred to two cases, both decisions in the Court of Appeal, having some little resemblance to the present case. One of them is the case of *In re Wagstaff. Wagstaff* v. *Jalland* (1), in which the Court of Appeal, affirming Kekewich J.

(1) [1908] 1 Ch. 162.

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came to the conclusion that the gift was good. The headnote is: "A testator gave all his furniture, household goods and "effects to his 'dear wife D. J. Wagstaff'; and after various "pecuniary legacies devised and bequeathed the residue of "his real and personal estate to his 'said wife' and two other "persons upon trust for sale and to invest and pay the interest "and annual produce thereof to 'my said wife during her life "'if she shall so long continue my widow,' and after her decease "or second marriage, upon trust, in the events which happened, "for the plaintiff. The lady whom the testator thus described "as his 'wife,' and with whom he went through the ceremony "of marriage in 1893, was at that time the wife of A. G. "Jalland, to whom she had been married in 1884, and who "was still living:—Held, on the evidence, that the testator "knew at the time he went through the ceremony of marriage "that the lady was then the wife of A. G. Jalland, and, consequently, that upon the true construction of this will she "was entitled to a life interest in the residuary estate unless "and until she contracted a marriage subsequent to the death of "the testator." In that case the Court of Appeal came to their conclusion in this way. Sir H. Cozens-Hardy M.R. said (1): "'And upon or after her decease or second marriage'—then "over. Now, what does that mean? Surely it means this: "'I give the income of my residuary estate to be received "'by the lady with whom I went through the form of marriage "'at St. George's, Hanover Square, during her life, if she "'shall so long continue my widow, for her own use and "'benefit, and upon her decease or second marriage, then "'over.' He has himself interpreted it by the words 'continue "'my widow' there—'continue my widow until she marries "'again.' Given his knowledge of the facts, I am bound to "say that I think the learned judge, in the declaration which "he made on the construction of this will, was perfectly right, "and that this lady is entitled to the income of the estate "during her life or until her second marriage. If I wanted "any aid to the interpretation in the body of the gift, I should "certainly find it in the language of the gift over. The

(1) [1908] 1 Ch. 162, 165.

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"property is given over only upon her decease or upon her "second marriage." Then Farwell L.J., who agreed with that decision, said (1): "On the question of construction it is "legitimate and usual for the purpose of construing a gift "in a will to refer to the gift over which operates to defeat or "determine that gift. The cases on the word 'survivors' "show how important the gift over is. Here the testator "knew that he had gone through the ceremony of marriage "with a lady who had been before married; therefore when "he speaks of a second marriage he knows that is not an "accurate phrase, but he means her future marriage. Then "he says she is to have the income so long as she continues "his widow, with a gift over on her future marriage. Reading "the two together, he means that she shall continue to receive "the income until she goes through a further, a future, "ceremony of marriage, and in that event the estate shall go "over. When one analyses the construction put by the "appellant(s) on these words it is to my mind almost extravagant. They contend that the testator has said, in the words "of the psalmist, 'This lady is to have this income "until my " ' "abominable sin shall be found out." ' "

In the other case, which is perhaps in some ways a little more close to the one before me, *In re Boddington* (2), the Court of Appeal took a contrary view. The headnote of the report of the hearing before Fry J. is: "A testator by his will gave the proceeds of sale of his residuary "estate to trustees, on trust to pay to his wife E. C., within one "month after his decease, a legacy of 200*l*., and in addition "thereto to pay to his said wife, 'so long as she shall continue "' my widow and unmarried,' an annuity of 300*l*., commencing "from the date of his decease, 'or otherwise in lieu and in "'substitution of the said annuity, at the option of my said "' wife, if she shall prefer it, a legacy of 2000*l*. And I direct "' that the provision hereby made for my said wife shall be "' in lieu and satisfaction of any dower or thirds to which she "' might be entitled out of my estate.' After the date of the "will the marriage was, in a suit in the Divorce Court instituted

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(1) [1908] 1 Ch. 162, 166.

(2) 22 Ch. D. 597; 25 Ch. D. 685.

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"by the wife, declared void ab initio, on the ground of the "impotency of the testator. He died without altering his "will :—Held, that the late wife was entitled to the legacy of "200*l.*, but that she could not claim the annuity inasmuch "as she, never having been in law the wife of the testator, "never could be or continue his widow, and the annuity was "therefore given for a period which could never come into "existence." That was a decision of Fry J., as he then was, and in his judgment he says (1) : "Then arises the question "whether she is entitled to the annuity of 300*l.*, given to her "' so long as she shall continue my widow and unmarried.' "It appears to me that the annuity is given to her for a period "which can never come into existence. She never was the "testator's widow, and therefore she can never continue his "widow for any length of time. On principle, therefore, I am "unable to see how an annuity for a non-existing period can "possibly be claimed. The only doubt in my mind has arisen "from the case of *Rishton* v. *Cobb* (2), to which I have already "referred." Then he makes a reference to that case and holds, notwithstanding that decision, that in the case before him the lady was not entitled to the annuity because it was given to her for a period which could never have any existence in fact. That decision was affirmed by the Court of Appeal and the principal judgment in that case was that of the Earl of Selborne L.C. He says (3) : "But on the point of law I think "that the construction of this will, supposing there had been "no authority on the subject, is reasonably plain. The words "are these : ' And in addition thereto to pay to my said wife, "' so long as she shall continue my widow and unmarried, an "' annuity of 300*l.* by equal quarterly payments, commencing "' from the date of my decease.' These words appear to "express, as plainly as language can, that the status of widowhood is a condition of the inception and a measure of the "duration of the gift. For my own part I have no difficulty "in saying that these words make it clear that she cannot "take the annuity at all unless she is the testator's widow,

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(1) 22 Ch. D. 597, 602, 603.

(2) (1839) 5 My. & Cr. 145.

(3) 25 Ch. D. 685, 687, 688.

"and that if at any time she ceases to be his widow she ceases "to be entitled to it. It was ingeniously contended that if "the word 'unmarried' had been alone used, it would, if the "lady had been the testator's wife at his decease, have come "to the same thing as the words which the testator has used. "Perhaps that may be so, but one must remember that the "moral obligation to make provision for a widow depends "upon the fact that she is the testator's widow. Therefore "the word 'widow' must be regarded as the principal word "here, and the word 'unmarried' must be regarded as only "added ex cautela, as I should think, to show that though "in some cases and for some purposes rights acquired by a "widow as such might continue after her second marriage, "it was not intended to be so here." He came therefore to the conclusion that Fry J. was right in deciding that the gift to the lady in question could not take effect. Neither of those cases is exactly on all fours with the case that I have to determine. In the second case the lady was, at the date of the will, a person recognized as the wife of the testator: by the time of the death she had ceased to be a person so recognized and in fact the marriage had been declared void ab initio, so that she could never become the widow of the testator. In the other case the lady never was the wife of the testator at all, in any circumstances: she went through a ceremony of marriage with him when she herself had a husband alive and, therefore, never was married to the testator. The testator when he went through the ceremony of marriage was aware of the fact that he was aiding and abetting the crime of bigamy and, when he made his will, he gave to the lady (describing her as his dear wife D. J. Wagstaff) an interest during her life or widowhood. The court in that case came to the conclusion that the testator was using the word "wife" in connection with the name as indicating a particular person, who could be ascertained beyond all doubt, namely, the lady to whom the benefit had been given: and that accordingly the gift took effect, although the lady was described as his wife, and that it was expressed to be during her so-called widowhood, meaning thereby the period from the death of the testator until she either died or married again.

Having those two decisions in mind, what construction am I to put upon this particular will? It is quite clear from the will itself that the testator was under no delusion as to his relationship to Dorothy Marie Laing, for he has made a gift in the will itself to the lady who was his wife. There is, therefore, no difficulty in ascertaining who is the person described as "Dorothy Marie Laing." That he did intend her to have some provision under the will is, I think, plain: but has he made that provision in terms entitling her to enjoy it? That is the whole question. If I am to read this will in the light of the decision of the Court of Appeal in *In re Boddington* (1) the period during which she is to enjoy these benefits is one which does not and cannot exist, because she never could become, in any circumstances, the widow of the testator. It seems to follow according to the decision in *In re Boddington* (1) that this gift is not effective, being for a period which never could have, and never has, existed. Similarly the payment to her of the weekly sum is for a period which never could come into existence.

On the other hand, it is said that here is a gift in terms indicating that it is for a period to begin at the death of the testator and to continue until the marriage of the donee, and that the conditions upon which the benefits cease are in general restraint of marriage and consequently void with the result that the donee is entitled to the enjoyment of the house, not "during her widowhood," but on the footing that the house belongs to her. With regard to the payment of 1*l.* 5*s.* a week, it is likewise argued that she is entitled to it for twelve years.

In my judgment, in this case I ought to follow the decision in *In re Boddington* (1). It seems to me that the principle of that decision applies in this case. Here there is a gift to a person for a period which, in fact, never can exist at all. The period begins with something which can never happen, namely, the moment at which Dorothy Marie Laing becomes the widow

(1) 25 Ch. D. 685.

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of the testator. There never can be any period during which she is or was his widow, and all that she is given is an interest during her widowhood. Applying to those facts the decision in *In re Boddington* (1) which is binding upon me so far as relevant, I am, I think, bound to say that Dorothy Marie Laing is given benefits during a period which in fact has no existence whatsoever. The testator intended to benefit the lady by his will, but he has used language which, in my judgment, unfortunately, cannot have that effect. The result is that Dorothy Marie Laing is not entitled either to the interest in the house which he attempts to give to her, or to the weekly payment provided by the latter part of the will, and I will make a declaration accordingly. The money will fall into the residuary estate. With regard to the trustees, it would be very hard to say that they have not acted reasonably. I think that they are entitled to the relief which they seek under the Trustee Act, 1925. In the circumstances, I think that I can properly direct that the costs of all parties as between solicitor and client be paid out of the estate.

Solicitors: *Corbin, Greener & Cook, for Pullan, Davies & Co., Leeds; J. H. Milner & Son.*

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(1) 25 Ch. D. 685.

K. R. A. H.

In re POLLOCK.

POLLOCK *v.* POLLOCK.

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Feb. 26.

Administration—Will of testatrix bequeathing estate to husband—Husband shoots wife and commits suicide—Inquest and verdict—No evidence to prove state of husband's mind—Presumption of felonious intent—Administrator's right to distribute wife's estate as upon her death intestate.

A husband and wife were found dead in their home in circumstances which left no doubt that the husband first shot his wife dead with a revolver and immediately afterwards committed suicide. An inquest was held, and the jury returned a verdict to that effect. There was no evidence to show what the husband's state of mind was at the time, except that he was suffering from depression caused by the war. The wife had made a will by which she left all her property to her husband absolutely. A summons was taken out by the administrator of the wife's estate asking for directions of the Court :—

Held, that, as the only evidence before the Court was that the husband shot his wife and then committed suicide, and there was nothing to show whether he was sane or not at the time, the presumption was that he murdered his wife, and therefore his estate was not entitled to take any interest under her will, and her administrator was authorized to distribute her estate on the footing that she had died intestate.

In re Sigsworth. Bedford v. *Bedford* [1935] Ch. 89 applied.

SUMMONS.

The summons was taken out by the administrator with the will annexed of Mrs. Eveline Morton Pollock asking for directions how her estate should be distributed, having regard to the events which had happened. Mrs. Pollock, who was the wife of Mr. Hamilton Rivers Pollock, by her will dated July 18, 1924, gave the whole of her property to her husband. Mr. Pollock made his will on June 5, 1940, and thereby gave his residuary real and personal estate in trust for his wife during her life and subject thereto in trust for his children and their issue, and on failure of grandchildren to attain a vested interest there was an ultimate trust for two charities. On June 11, 1940, Mr. Pollock shot and killed Mrs. Pollock with a revolver and immediately afterwards committed suicide. The evidence as to their deaths is fully stated in the judgment

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of the learned judge. The estate of Mrs. Pollock amounted to some 39,000*l.*

Sir Lancelot Elphinstone for the plaintiffs.

If the husband killed his wife feloniously then he could not take under her will. But here he could not have been convicted of murder, as he committed suicide immediately afterwards. The prosecution must prove the guilt of the prisoner, but the prisoner need not prove his innocence. There is no evidence in this case that the husband killed his wife maliciously; in fact her death might possibly have been accidental. He referred to *Woolmington* v. *Director of Public Prosecutions* (1), *Rex* v. *Davies* (2), and *In re Sigsworth. Bedford* v. *Bedford* (3).

Romer K.C. and *Gravenor Hewins* for the infant daughter of the testatrix. The evidence is that the husband shot his wife but there is no evidence of his state of mind at the time, or that he intended to murder her. But in the absence of evidence the presumption is that he was sane at the time and therefore the husband's estate cannot take any interest in the wife's estate.

Geoffrey Cross for the charities adopted the plaintiff's argument.

FARWELL J. This summons asks on behalf of the administrator of the estate of Eveline Morton Pollock "whether "the residuary real and personal estate of the said Eveline "Morton Pollock deceased passed under her will to the said "Hamilton Rivers Pollock, or whether the said Eveline "Morton Pollock died intestate as to such residuary real and "personal estate."

The question arises in somewhat tragic circumstances. The lady was the wife of Hamilton Rivers Pollock, and by her will, dated July 18, 1924, she gave the whole of her property to her husband. The husband made his will on June 5, 1940. He appointed certain persons to be executors and trustees, and he gave all his personal chattels and the sum of 5000*l.*

(1) [1935] A. C. 462, 480.

(2) (1913) 29 Times L. R. 350.

(3) [1935] Ch. 89.

to his wife. He then gave all his property to his trustees on trust for sale and conversion. Subject to the payment of debts and funeral and testamentary expenses he then directed his trustees to stand possessed of the said residue in trust to pay the income thereof to his wife during her life and after her death in trust to divide the same in three equal shares and to retain each share and the investments representing the same for each of his children, Martin Rivers Pollock, Marian Eveline Pollock, and Margaret Gordon Pollock. The trusts of the children's shares were then settled on them and their children with an ultimate trust in favour of the Master and Fellows of Trinity College, Cambridge, and the National Trust for Places of Historic Interest or Natural Beauty in equal shares.

On June 11, 1940, the husband and wife both died as the result of revolver shot wounds. There was no one actually present in the room at the time of their deaths and, therefore, there is no one who can give direct evidence of the manner of their deaths. The evidence which I have read, namely, the evidence of the doctor who had attended both these people during their lifetime, and the evidence of the woman who was housekeeper at the house—that evidence being evidence which is admissible in this Court for the purpose of these proceedings —indicates, I think, beyond any reasonable doubt, that the husband shot his wife and then himself. The evidence is not absolutely conclusive, but the evidence of the housekeeper is that she had breakfast with the husband and wife, the husband at the time being rather quiet, but otherwise apparently normal, while the wife was in her usual spirits; that she left the room and went upstairs to attend to some domestic matters; that she heard someone go upstairs and then go down again; and that almost immediately afterwards she heard two shots. She went down to the morning room and there found the wife sitting in a chair dead, having been shot through the head, and the husband also dead, having been shot through the mouth. I do not think that anyone reading the whole of the evidence can have any real doubt that what happened was that the husband killed his wife and then committed suicide. But there is no evidence whatever to indicate what was the state of mind of the husband at the time when he killed his wife and committed suicide.

The evidence of the doctor and of the housekeeper in this regard is, I think, much to the same effect. They both say that the husband was, and had been for some months, in a depressed condition ; he was worried by the war and by the stress of life in present circumstances. No doubt he was feeling the strain under which we all are living at the present time, and perhaps showing the effect of the strain rather more openly than most people. But beyond that there is no evidence to show what was the state of his mind at the moment when he and his wife died. There was an inquest and the matter was considered by a coroner and jury. The jury found that the wife died as the result of a revolver shot fired by the husband and that the husband committed suicide, but that finding is not evidence upon which I can act: *Bird* v. *Keep* (1). I have to proceed on such evidence as is properly admissible before me in the form of the affidavits which have been filed in this matter. So far as that evidence is concerned, all that has been established satisfactorily to my mind is that these two people died on June 11, 1940, the wife as the result of a revolver shot fired by her husband and the husband as the result of a revolver shot fired by himself. On the evidence before me that is sufficiently established, but there is no evidence which can enable me to come to any conclusion as to the state of mind of the husband at the moment of that fatal incident.

That one who has feloniously killed another cannot succeed to that other's property either under a will or under an intestacy is now well settled. There was at one time some doubt in the case of an intestacy, but that has now been determined, with the result that there is no difference in this respect between a will and an intestacy: *In re Sigsworth. Bedford* v. *Bedford* (2). It must, however, be remarked that if the fatal act was done at a time when the person who committed it was of unsound mind he is not guilty of felony and is not therefore

(1) [1918] 2 K. B. 692.

(2) [1935] Ch. 89.

disqualified from taking a benefit from the estate of the person whom he killed: *Felstead* v. *The King* (1).

It is, therefore, a matter of importance in a case of this kind to consider the position of the administrator who has to administer the estate of the person who was killed, because he wants to know whether he has to administer the estate on the footing that the slayer is entitled to participate in the estate of the deceased, or whether he has to administer the estate on the footing that the slayer has no right to benefit. That can only be answered definitely in a case of this kind by the Court coming to a conclusion on the evidence as to the condition of the mind of the slayer at the time that he did the deed. That condition, in circumstances such as these, it is impossible to establish. The man is dead, there is no possibility of his being prosecuted and no means of proving what his state of mind was at the time. But it seems to me, bearing in mind that this is a matter not of criminal law but a matter of the administration of an estate, that if a claim is made by a person on behalf of a deceased who killed another, it is for that person to show by evidence that the act was in fact not felonious but was done under a condition of mind which rendered it not criminal at all. Here no such evidence is forthcoming and in the absence of any such evidence the Court can, I think, only act on the assumption that the act of the husband which caused the death of the wife was felonious and, therefore, one which prevented any person claiming through the husband from benefiting from the wife's estate.

It is true that that is an assumption, and only an assumption. There is no evidence before the Court on which it can come to a definite conclusion and, therefore, the administrator is left in the position that, although the Court on the evidence before it has come to the conclusion that the husband killed the wife, the Court cannot decide the state of mind of the husband at the time; and if it were possible at any time hereafter for that state of mind to be proved and it was shown that the assumption on which the Court had acted was wrong,

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(1) [1914] A. C. 534.

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the administrator might find himself in a difficult position. But that seems to me in this case to be an infinitesimal risk. I cannot conceive how anybody can ever at any time prove what was the state of mind of the husband. In the circumstances I think that it is the duty of the administrator of the estate of the wife to act on the assumption that the husband was not entitled to benefit in any way from that estate.

I think, however, that I can go a step further than Clauson J. did in *In re Sigsworth. Bedford* v. *Bedford* (1). In that case he said: "I am willing, for the guidance of "the administrator, to decide the question of law which "arises if Thomas Bedford Sigsworth murdered his mother "and also [she] died before him; but to decide only on "that assumption. The administrator, if he acts on my "decision, will take the risk that the assumption of fact "may conceivably hereafter turn out to be erroneous." I will declare that on the evidence before me the residuary real and personal estate of the said Eveline Morton Pollock, deceased, did not in the events which happened pass under her will to Hamilton Rivers Pollock, and that the said Eveline Morton Pollock died intestate as to such residuary real and personal estate. I will give the administrator liberty to act on that footing and to distribute the estate accordingly. Such an order will protect the administrator personally against any claim in future by anyone claiming through the husband, although it will not prevent any person claiming through the husband and proving his claim from following the assets into the hands of the person who has taken them. The costs of all parties as between solicitor and client must come out of the wife's estate.

Solicitors: *E. S. P. Haynes; Horne & Birkett.*

(1) [1935] Ch. 89, 91.

H. L. L.

In re WEBB.

BARCLAYS BANK, LIMITED *v.* WEBB.

FARWELL J.

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Feb. 18.

Assurance—Infant children—Policies on lives—Premiums paid by father—Rights of father till majority of children—Children solely interested on majority—Policies to continue until majority on death of father before it having paid all premiums due—Death of father while children infants—Policies to be held in trust for children.

Where a person takes out, for or on behalf of an infant, a policy of assurance on which he (the assured) pays the premiums, the answer to the question whether the moneys secured on the policy are the property of the assured (or, if he is dead, of his estate) or must be held in trust for the infant, depends in each case on the construction of the policy. Unless the policy shows clearly that the assured intended to constitute himself a trustee for the infant and did so, the assured or his estate is entitled to them.

A father took out on the lives of his two children policies of assurance describing him as "the grantee" and as wishing to effect assurance "on behalf and for the benefit of the person "therein named as 'the life assured,'" namely, the child. Each policy provided that, if the premiums were paid, the sum assured would be paid to the child's personal representatives on proof of the child's death at or over twenty-one years of age, and gave to the father, his personal representatives or assigns, certain powers, before the child's twenty-first birthday, to terminate, continue or surrender the policy, to agree to its being modified or varied, and to assign or charge it. On the child's twenty-first birthday, all the father's rights and powers were to cease, and the child was to become solely interested in and entitled to deal with the policy, subject to any assignment of or charge on it still subsisting. If the child died before the age of twenty-one years, whoever had paid the premiums was to be entitled to recover a part of them: and if the father, having paid all premiums due, died before the child reached that age, the policy was to remain in force until, but not including, the child's twenty-first birthday.

The father predeceased both children while they were infants, having paid all premiums due :—

Held, that the form of the policies established a trust in favour of the infants against the father, and showed that he was contracting wholly on their behalf and for their benefit. The policies were therefore held by him at his death, and thereafter by the trustee of his will, in trust for the respective infants.

In re Engelbach's Estate [1924] 2 Ch. 348, and *In re Sinclair's Life Policy* [1938] Ch. 799, considered and distinguished.

ADJOURNED SUMMONS.

This summons was issued to determine whether policies of assurance effected by a father on the lives of his two infant

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children, whom he predeceased, formed part of his estate at his death, or had been held by him, and so were held by the trustee of his will, on trust for the two children.

Henry Bertram Law Webb (hereinafter called " the father ") took out policies of assurance on the lives of each of his two infant children, Thomas Roderick Webb and Theresa Helen Webb (hereinafter together called " the children "). The policies described the father as " the grantee," and as wishing to effect assurance " on behalf and for the benefit of "the person herein named as ' the life assured,' " namely, the child. Each policy provided that, if the premiums had been paid, the sum assured would be paid to the personal representatives of the child on proof that the child had died at or over the age of twenty-one years: and each policy gave to the father, his personal representatives or assigns powers, before the twenty-first birthday of the child, to terminate, continue or surrender the policy, to agree to its being modified or varied, or to assign or charge it. On the twenty-first birthday of the child, the rights and powers of the father, his personal representatives or assigns were to cease, and the child was to become solely interested in and entitled to deal with the policy subject to any assignment or charge on it still subsisting. If the child died before reaching the age of twenty-one years, whoever had paid the premiums was to be entitled to recover a part of them: and if the father, having paid all premiums due, died before the child reached that age, the policy was to remain in force until, but not including, the twenty-first birthday of the child.

The father died on August 19, 1939, having paid all premiums due on the policies. At that date both the children were infants.

By this summons, Barclays Bank, Ld. (hereinafter called " the bank ") which was the executor of the father's will, dated February 8, 1938, asked whether the policies formed part of his estate or were held by him at his death, and so by the bank at the date of this summons, in trust for the two children respectively.

E. M. Winterbotham for the bank.

Lindsay M. Jopling for the widow and others interested in residue. In this case the Court is faced with a familiar problem. The law is clear that a stranger to a contract cannot, as a rule, sue upon it. English law knows nothing of jus quaesitum tertio arising by way of contract. One exception is where one party entering into the contract is trustee for another. The policy in the present case makes no mention of a trust: the policy purported to be taken out "on behalf of" a child under one year of age. There is no real distinction between this case and cases in which a policy was taken out "for the "benefit of" a child or "for" a child.

The cases which turn on s. 11 of the Married Women's Property Act, 1882, are of no assistance in this case. That section provides that moneys payable under a policy of assurance effected by a husband or wife on his or her life expressly for the benefit of the other party to the marriage, or of the children, or of the other party and of the children or some of them, shall not form part of the estate of the insured.

The earlier cases are discussed in *In re Sinclair's Life Policy* (1). In that case the child was called the nominee and the policy moneys were to be payable to the child. It was held that no trust was created. It was also held that the question was not affected by s. 56, sub-s. 1, of the Law of Property Act, 1925, which provides for the taking of interests in property by persons who are not parties to the instruments creating the interests. In *Cleaver* v. *Mutual Reserve Fund Life Association* (2) the policy was taken out for the benefit of the wife. The effect of that provision, apart from the Married Women's Property Act, 1882, was stated by Lord Esher M.R. (3) and by Fry L.J. (4).

In *In re Engelbach's Estate* (5) these statements were followed and applied by Romer J. The policy in that case was taken out "for" the child and the moneys were to be payable to the child. It was held that no trust was created. There have been two cases since *In re Sinclair's Life Policy* (1). In *In re*

(1) [1938] Ch. 799.
(2) [1892] 1 Q. B. 147.
(3) Ibid. 151, 152.
(4) [1892] 1 Q. B. 157.
(5) [1924] 2 Ch. 348.

Foster (1) before Crossman J. it was again held that s. 56 of the Law of Property Act, 1925, does not affect the question and also that there was no trust. *In re Gordon* (2), decided by Simonds J., turned on the rules of the friendly society and is really of no assistance in the present case.

J. Leonard Stone for the children. This is certainly not a familiar form of policy. It could almost be believed that the draftsman of it had in mind the form of policy considered in *In re Engelbach's Estate* (3). In the present case, not only is everything done "on behalf of" the child, but the whole scheme of the policy itself works as if it was a policy belonging to the child and not to the father. The case is distinguishable from *In re Engelbach's Estate* (3) and *In re Foster* (1). In the present case the special conditions are of supreme importance, and constitute a complete scheme which is "on behalf" as well as "for the benefit" of the child. The policy provides that the father may do certain things, but only "on behalf of" the child, and that all his rights shall cease as soon as the child attains the age of twenty-one years. The present case is like no other that has been reported. It answers the problem raised by the Court in *In re Foster* (1). The policy in the present case provides that all the things can be done only "on behalf of" the child. None of the other cases go any further than stating that the policy was taken out either "for the benefit of" or "to be paid to" the infant. There never has been a case which went to the length to which this case goes. *In re Gordon* (2), a slightly different case in which the rules of a friendly society were invoked, shows that all the circumstances of each case must be examined in order to discover whether the contracting party has really entered into the contract on his or her own behalf, or is a trustee for the benefit of someone else.

Lindsay M. Jopling in reply (by invitation of the Court). Romer J. in *In re Engelbach's Estate* (4) certainly says that the policy in that case was not taken out on behalf of or as agent for the child. But he must not be taken to mean that

(1) [1938] 3 All E. R. 357.
(2) [1940] Ch. 851.
(3) [1924] 2 Ch. 348.
(4) Ibid. 355.

"on behalf of" has the same effect as "in trust for" or that a policy taken out by a person purporting to be an agent affords an exception to the rule. The question is purely one of construction of this document. It would have been very easy to use the words "in trust" if that had been the intention: on the construction of this document no trust is declared.

FARWELL J. This summons raises a question on the true construction and effect of certain policies of assurance. The parent who effected these policies made a will dated February 8, 1938, and died on August 19, 1939. By the will he appointed Barclays Bank, Ld., his executor and trustee and he devised the whole of his residuary estate to the bank on the usual trusts for sale and conversion and directed the bank to pay out of the proceeds of sale his funeral and testamentary expenses, debts, etc., and then on trust to pay the income to his wife during her life, and from and after her death "upon "trust to pay the income thereof to all and every my children "or my child (if only one) living at my death who being sons "or a son attain the age of twenty-one or being daughters or "a daughter attain that age or marry and if more than one "in equal shares." There follow certain provisions with regard to the children's shares, and in the event of no child of the testator becoming entitled or of the trusts failing in respect of the children there is a trust in favour, as to capital and income, of the child or children of a brother of the testator. Finally the ultimate trust, if all the others fail, is in favour of the Pension Fund of the Incorporated Society of Authors, Playwrights and Composers. Nothing in the will causes any difficulty and no question of construction of the will arises.

The question which I have to determine arises in this way. The testator left him surviving his widow (who is a defendant to this summons) and two children, Thomas Roderick Webb, born on December 5, 1933, and Theresa Helen Webb, born on December 24, 1935. During his lifetime the testator took out two policies, copies of which are produced, on the lives of his said two children. He paid all the premiums on the

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policies down to the time of his death: and the question now arises whether the moneys secured by the policies are the property of the respective infants, that is to say, whether the infant named in each policy is entitled to the money assured, or whether the money which is or will be payable under them is the property of the testator and forms part of his estate.

Questions of this kind have been before the Court more than once recently, and in all the cases known to me concerning a policy of this kind taken out by a father or other person on behalf of an infant it has been held that the mere fact that a person takes out a policy for or on behalf of an infant does not constitute that person a trustee for the infant, and that (apart from some special provisions in the policy pointing to the conclusion that the insurance money was to be a fund to which the infant was to be entitled and that, accordingly, the assured and the assured's estate would receive any money under it merely as trustee for the infant) the infant for whom the policy was taken out has no title to the money. I think that the foundation of those decisions was a case, in the Court of Appeal, of *Cleaver* v. *Mutual Reserve Fund Life Association* (1). That case arose out of the somewhat notorious death of Mr. James Maybrick with the resulting charge of murder against his wife. The headnote is: "The "executors of a person who has effected an insurance on his "life for the benefit of his wife can maintain an action on the "policy notwithstanding the fact that the death of the insured "was caused by the felonious act of the wife. The trust "created by the policy in favour of the wife under the Married "Women's Property Act, 1882, s. 11, having become incapable "of being performed by reason of her crime, the insurance "money forms part of the estate of the insured; and as between "his legal representatives and the insurers no question of "public policy arises to afford a defence to the action." I do not think it necessary for me to refer in any detail to this case but the result of it was that the representatives of the husband became entitled to recover the money. Subsequently a case came before Romer J. (as he then was) in which he cited the

(1) [1892] 1 Q. B. 147.

judgment of Fry L.J. in the *Maybrick* case (1). That was *In re Engelbach's Estate* (2), which is not unlike the present case. The headnote is: "An endowment policy taken out "by a person in his own name for the benefit of his daughter, "to mature on her attaining a specified age, creates no legal "estate in the daughter, and she cannot sue on the contract, "nor does the assured thereby constitute himself a trustee for "his daughter of the policy and of the moneys payable there"under. If, therefore, the assured dies before the policy "matures, the policy moneys belong, not to the daughter, but "to the estate of the assured, and must be paid to his "executors." Romer J. in that case begins his judgment by saying: "A very similar question to the present one arose in "*Cleaver* v. *Mutual Reserve Fund Life Association* (3)". Then he continues: "Before considering that case, however, I may "say this: the daughter could of course successfully claim "these moneys if she had at the death of the testator a legal "right to them, that is to say, a right at law to recover the "moneys from the society, because, although that legal right "might have been given to her purely voluntarily by her "father, still there would be no resulting trust in favour of "the father, seeing that there would be a presumption of "advancement. The only other ground upon which the "daughter could claim these moneys as against the executors "of her father would be that the father in some way "constituted himself a trustee for the daughter of the policy "and of the moneys payable thereunder." Then Romer J. proceeds to consider portions of the judgments of Lord Esher M.R. and of Fry L.J. in the *Maybrick* case (1) and he comes to the conclusion that in the case before him no trust was created in favour of the daughter. He says: "It follows "from that"—that is, the citation from Fry L.J.—"that in "the present case the daughter could not have enforced this "contract in her own name against the insurance company, "and that she was an absolute stranger to the contract, which "could have been put an end to by both of the contracting

(1) [1892] 1 Q. B. 147.
(2) [1924] 2 Ch. 348, 351, 353.
(3) [1892] 1 Q. B. 147.

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"parties without her assent. It also follows from that "decision that the mere fact that the policy moneys are "expressed to be paid to somebody other than the assured "does not make the assured a trustee of the policy or of the "policy moneys for the person so nominated. I might mention "that that case was followed in somewhat similar circumstances "by Eve J. in *In re Burgess' Policy*" (1). Then he refers to the decision of Joyce J. in *In re a Policy No.* 6402 *of the Scottish Equitable Life Assurance Society* (2) and says: (3) "In "that case a policy of insurance had been taken out by A on "his own life 'for behoof of B,' and the policy provided that "B should be entitled to receive the policy moneys on A's "death. It was held that the legal personal representatives "of B, who received the moneys on the death of A, were "trustees of the policy moneys for the legal personal "representatives of A. The actual decision, therefore, is in "accordance with the two cases I have already referred to. "But the grounds on which Joyce J. based his decision were "these. He treated B as the person who had the right at "law to enforce the policy and give a receipt for the policy "moneys but held that, being a stranger to A and there "being no consideration for his so being put into possession "of this legal right to enforce the policy, B would hold the "policy moneys when received as trustee for A in accordance "with the doctrine of *Dyer* v. *Dyer*" (4). Then the learned judge proceeds: "Coming therefore as I do to the conclusion "that the daughter did not acquire any interest at law or in "equity to the policy or the policy moneys merely by reason "of the fact that the policy moneys are expressed to be "payable to her, I still have to consider whether the testator "ever constituted himself a trustee for the daughter in some "other way. It appears that in the proposal form which the "father had to fill up and sign he inserted opposite the words "'Full name and description of the Proposer' the words "'Edward Coryton Engelbach, for his daughter Mary Noel,

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(1) (1915) 113 L. T. 443.

(2) [1902] 1 Ch. 282.

(3) [1924] 2 Ch. 348, 354.

(4) (1788) 2 Cox. 92, 93; 1 Watk. Copy 216.

" 'aged one month,' and it is said that by that means he "constituted himself a trustee of the moneys payable under "the policy. But that point is also, I think, concluded by "the authority of *Cleaver* v. *Mutual Reserve Fund Life* "*Association* (1). In the passage in the judgment of Fry L.J., "part of which I read just now, he says: 'By the proposal "'which was made part of the policy he' (that is Mr. Maybrick) "'expressed the policy to be effected for the benefit of his "'wife,' and he came to the conclusion that, apart from s. 11 "of the Married Women's Property Act, 1882, that fact would "not have constituted Mr. Maybrick a trustee of the policy "or the policy moneys for his wife. The only distinction that "I can see between that case and the present one is this. "In the proposal form Mr. Engelbach, the father, did not say "that he was effecting this policy for the benefit of his daughter "but said that he was making the proposal for his daughter. "It is sought from that to draw the inference that the father "was, by this proposal form, stating that he was entering into "the contract on behalf of his daughter, not merely for her "benefit, but was making the whole contract on her behalf. "I cannot think that that is the true construction of this "proposal form. It appears to me extraordinarily unlikely "that a father would purport to enter into such a contract as "this as agent for his daughter who was one month old, a "contract which involved, if the father and the daughter were "to get any benefit out of it, the continuous payment of a "premium by the father. I think that the words of the "proposal really mean no more in this case than the proposal "made in the *Maybrick* case (1) and that the father entered "into this contract in his own name and on his own behalf but "for the benefit of his daughter." Then he says that he feels constrained by the authorities to decide against the contention of the daughter. That decision was followed by myself in the case of *In re Sinclair's Life Policy* (2) to which I do not propose to refer at any great length. In that case a man took out an endowment policy in his own name for the benefit of his godson to mature in seventeen years. The person who took

(1) [1892] 1 Q. B. 147.

(2) [1938] Ch. 799.

out the policy died before the godson had attained the necessary age. Thereupon the question arose whether the moneys payable under the policy belonged to the person who had taken it out or to the godson. Following the decision of Romer J. in *In re Engelbach's Estate* (1), I came to the conclusion that there was nothing in the case sufficient to create a trust in favour of the godson and that, consequently, the assured, although no doubt he intended to benefit his godson, had not done sufficient to constitute himself a trustee for him, and that, accordingly, there was nothing which could entitle the godson to the benefit of the policy moneys, which belonged to the person who had effected the policy and had paid the premiums. That, I think, really was a case which entirely followed, in principle, the decision of Romer J. in the earlier case. I could not in that case, any more than Romer J. could in his case, find in the terms of the policy or elsewhere anything creating the assured a trustee for the infant. Since then there has been a case of *In re Foster* (2), before the late Crossman J., and there has been a decision by Simonds J. in *In re Gordon* (3), but the latter turned upon rather different considerations.

In my judgment, the whole question in these cases depends upon the true construction of the particular policy. I think that one must assume that, unless there is in the policy something establishing reasonably clearly that the assured was in fact constituting and intending to constitute himself a trustee for the infant of the assurance moneys, the infant is not, and the personal representatives of the deceased are, entitled to the moneys payable. Again, I think that the cases show that the mere fact that a policy is taken out for or on behalf of an infant is not alone sufficient to constitute such a trusteeship. It is for a person to make clear by the language used that he is constituting himself a trustee, and the absence of any clear words to that effect render it difficult for the infant to establish a trust on his behalf. But the policy which I have to consider is one in terms which are quite

(1) [1924] 2 Ch. 348.
(2) [1938] 3 All E. R. 357.
(3) [1940] Ch. 851.

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different from any policy that I have seen before, and there are provisions in it which I think differentiate it from the policy which I had to consider, for instance, in *In re Sinclair's Life Policy* (1), or which Romer J. had to consider in *In re Engelbach's Estate* (2). In the proposal for the policy, under "Particulars respecting the child to be assured," the name of the child is given and the address and the place and date of birth. Then follow certain particulars with regard to the health of the father and mother, and certain questions are answered. Then under "Particulars respecting the person "making the proposal" there follow the name of the father, his address, his occupation, and the relationship to life proposed to be assured, which is stated to be "Father." Then "At "what age (21 or 25) are options to commence." Then after that is stated the annual premium, 47*l.* 11*s.* 8*d.* Then there is a note: "If it is desired that payment of premiums falling "due before the child attains age 21 or 25 shall cease in the "event of death of proposer, the particulars indicated overleaf "should be furnished." Then follows a declaration which I need not read. Then on the back of the proposal form there are certain facts stated with regard to the health of the father and mother and certain other questions, which I do not think I need read. Then I turn to the policy. It begins in this way: "Whereas the person named in the Schedule hereto "as 'the grantee,' being desirous of effecting with the Friends' "Provident and Century Life Office (herein called 'the Office') "the assurance described in the said Schedule on the life on "behalf and for the benefit of the person therein named as "'the life assured,' has delivered to the Office the proposal "and declaration mentioned in the said Schedule as the basis "of the Contract of Assurance herein contained." It is to be noticed that the father is the person who is described as "the "grantee," and the grantee is stated to be desirous of effecting an assurance "on the life on behalf and for the benefit of the "person therein named as 'the life assured'"—that is the child. Then follow the provisions of the policy: "In con-"sideration of the payment to the Office of the first premium

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(1) [1938] Ch. 799.

(2) [1924] 2 Ch. 348.

"and of the subsequent premiums (if any) to be paid as "provided in the said Schedule the Office will pay the sum "assured mentioned in the said Schedule to the person or "persons to whom the same is therein expressed to be payable "upon proof satisfactory to the Directors of the Office of (*a*) "the happening of the event set forth in the said Schedule, "(*b*) the title of the person or persons claiming payment; and "(*c*) the age of the life assured if it has not previously been "admitted. This assurance shall carry and be subject to the "privileges and conditions contained in the Schedule hereto "and endorsed hereon (which are to be deemed part of this "policy) and is issued under and subject to the Laws and "Rules of the Office." I do not think I need read the next paragraph. Then follows a Schedule: "Date of proposal "and declaration—28th day of April, 1934. The grantee— "Henry Bertram Law Webb"—giving the address—"on "behalf and for the benefit of the life assured." Then the life assured is stated to be, "Thomas Roderick Webb, son of the "grantee." The date of birth is again stated. Then follows: "Sum assured—Amount, Six thousand and forty two pounds ". . . . Event on which to become payable—The death of "the life assured, provided he/she shall die on or after the fifth "day of December, 1954 (being the day on which he/she "attains the age of 21 years, and herein called 'the life assured's "'21st birthday'). To whom payable—The personal repre- "sentatives or assigns of the life assured, subject to special "condition 2 below. Where payable—At the London Head "Office." Then follows a statement about the premiums: there are various rates. "Period during which payable— "Until the death of the life assured, subject to the special "conditions below." Then follows this provision: "Options "at age 21. During the thirty days immediately preceding "the life assured's 21st birthday and on his/her behalf, the "grantee, his personal representatives or assigns, may at his "or their option exercised by notice to the Office: (1.) Ter- "minate the assurance as on the day prior to such birthday "and receive a payment in cash of 996*l.* 19*s.*" It is to be noticed that the option which is there given is during the thirty days immediately preceding the life assured's twenty-first birthday, and on his behalf the grantee may terminate the assurance on payment to him of a sum of 996*l.* 19*s.* I think it would be difficult to say, in face of the words "on his behalf," that if the grantee did on behalf of the infant exercise the option and receive that sum he would not receive that sum on behalf of and as trustee for the infant. Then follows this: "or (ii.) Determine that the assurance shall continue as from "such birthday in the form of either an ordinary Whole Life "or an Endowment Assurance for amounts and subject to "payment of premiums as follows." Then follow the payments of annual premiums, to which I need not refer. Then comes: "If such option be not exercised the assurance will "continue in force in accordance with the terms of this policy." Then follows this: "Notwithstanding anything hereinbefore "contained, until (but not including) the life assured's 21st "birthday and on his/her behalf the grantee, his personal "representatives or assigns shall have full power to (i.) sur-"render this policy; or (ii.) agree to any modification or "variation thereof; or (iii.) assign or charge the same by way "of mortgage or security for any sum not exceeding the "surrender value of the policy at the time of such assignment "or charge with interest on such sum, and his or their receipt "for any moneys paid upon or in respect of any such "transaction shall be a good discharge." Again it is to be noticed that the power given to the grantee or his personal representatives in that clause is a power to be exercised on behalf of the infant. "On the 21st birthday of the life "assured (if this policy is still subsisting) all rights and powers "of the grantee, his personal representatives and assigns, "in relation to this policy will cease and the life assured will "become solely interested therein and entitled to deal therewith "subject nevertheless to any such assignment or charge by "way of mortgage or security as aforesaid then affecting the "same." Then there follows a clause which I need not read. Then: "The grantee, his personal representatives or assigns, "may at his or their option on behalf of the life assured convert "this assurance into an assurance for a sum payable in annual "instalments as follows"—then follow the instalments. So that, again, the grantee has a power which he can only exercise on behalf of the life assured. Then in clause 6 there is the provision: "If the life assured shall die before his/her 21st "birthday there shall be paid to the grantee, his personal "representatives or assigns, the sum of 40*l.* 5*s.* 8*d.* on account "of each year's premium paid in respect of this policy with "compound interest thereon." In other words, if the infant dies under the age of twenty-one the person who has paid the premiums during that period is entitled to recover a part of those premiums. Clause 7 provides: "If the grantee "shall die before the life assured's 21st birthday and all "premiums becoming due on or before the date of the grantee's "death shall be duly paid, then this policy shall remain in "force until (but not including) the life assured's 21st birthday "without payment of any further premiums for the period "up to (but not including) that day." Then there are certain privileges and conditions, which I do not think it necessary for me to refer to except that in (III.) there is a provision that "If it is desired to discontinue the payment of premiums after "at least two years' premiums have been paid the assurance "will, on application before the expiration of the month of "grace, be exchanged for a fully paid-up assurance provided "the value is sufficient to secure a paid-up assurance for at "least 20*l.*" I cannot help feeling that the person who was responsible for the form and language of that policy must have had somewhere at the back of his mind some recollection of the effect of the case before Romer J. It seems to me that the author of this document—whether he succeeded in doing it or not is a different matter—did certainly design a form of policy which he thought would constitute the man who effected the policy a trustee for the infant in question. Of course, I must bear in mind what Romer J. said, that it is unlikely that a person would enter into a contract which bound him to pay premiums on behalf of and as agent for an infant of very tender years, and that observation no doubt applies in the present case; but I cannot help feeling that in this case the form of the policy is intended to do exactly what the policy in the case before Romer J. and in the other case before myself did not do, that is to say, create a trust in favour of the infant whose life was assured. It is a pity, I think, that, if that was the intention of the parties, it was not quite clearly stated, as it might have been by using the words "as trustee," or similar words. But on the whole I think there is enough in this case to disclose the intention to create a trust. Throughout the policy the grantee is said to be acting on behalf of the infant; the grantee before the infant attains twenty-one is given certain powers to surrender or to agree to modification, etc.; but, again, those powers have to be exercised on behalf of the infant, and, if they are so exercised by, for instance, surrendering the policy, any money so acquired would, it seems to me, belong to the infant and not to the grantee, because that would be a term of the bargain between him and the insurance company on behalf of the infant and, as such, would give the infant, rather than the grantee, the right to the money which resulted. But most striking of all, I think, is the provision that, if the life assured attains the age of twenty-one, then any interest which the grantee had in the policy or the moneys secured under it completely disappears. That the grantee had an interest up to that date I think is plain from this, that should the infant die under twenty-one, the grantee was entitled to recover a portion of the premiums which he had paid, and any money representing the surrender value would, I think, belong to the grantee because he parted with the money required to keep the policy on foot. As soon, however, as the infant attained twenty-one the grantee's interest under the policy, whatever it may have been, ceased and determined once and for all. The future terms then became a matter wholely between the Insurance company and the life assured. I think that the life assured was the person entitled in that event to the money payable under the policy: and if there were any further payments to be made the life assured was the person to make them. It seems to me, when I consider the whole of the terms of this policy, that there is in this case sufficient to do that which I thought the policy

(1) [1938] Ch. 799.

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did not do in the case before me of *In re Sinclair's Life Policy* (1), namely, to establish a trust in favour of the infant as against the father, who no doubt effected the policy but did so on behalf of the infant and on the special terms to which I have referred, which I think show that the father was contracting, not on his own behalf or for his own benefit, but wholly on behalf of and for the benefit of the infant. In those circumstances, this case is, in my judgment, distinguishable from the case before Romer J. and the earlier decision of my own; and I think that in this case it is right to make a declaration that the two policies were held by the testator at his death and are now held by the plaintiff bank in trust for the two infant defendants respectively.

The costs will be taxed as between solicitor and client and paid out of the estate.

Solicitors: *Field, Roscoe & Co.*

K. R. A. H.

In re GREAT EASTERN ELECTRIC COMPANY, LIMITED.

SIMONDS J.

1941

Feb. 24, 25; Mar. 10.

Company — Winding up — Voluntary liquidation — Continuance of business—Necessary for beneficial winding up—Liquidator's decision to carry on business, how justified—Rights of creditors—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 191, *sub-s.* 1 (*b*); *s.* 248, *sub-s.* 1 (*b*).

A liquidator in a voluntary liquidation is justified in proceeding, in the exercise of his statutory powers, to carry on the business of the company, if he bona fide and reasonably forms the opinion that the carrying on of the business is necessary for the beneficial winding up of the company.

Observations of Sir G. Jessel M.R. in *In re Wreck Recovery and Salvage Co.* (1880) 15 Ch. D. 353, at p. 360, considered.

SUMMONS IN WINDING UP.

The Great Eastern Electric Company, Ld., was incorporated on April 22, 1925, under the name of Great Eastern Factoring Company, Ld., which was, in 1931, changed to the company's present name. The company went into voluntary liquidation on March 24, 1938, Phillip Adrian Houstoun being appointed voluntary liquidator. On May 8, 1939, an order was made for the compulsory liquidation of the company.

During the period of the voluntary liquidation the liquidator carried on the business of the company until the date of the presentation of the winding-up petition.

In the course of the investigation of the affairs of the company by the liquidator in the compulsory liquidation it was disclosed that the voluntary liquidator had distributed dividends amounting to 10*s.* in the £ to a large number of the creditors of the company at the date of the commencement of the voluntary winding up (hereinafter called "the pre-"liquidation creditors"), thus paying out 3116*l.* to creditors for 6232*l.*; that he neglected to make any payment to pre-liquidation creditors, whose debts amounted to approximately 70*l.*, and that he had, in carrying on the business, incurred obligations to creditors (hereinafter called "the post-liquidation "creditors") which he did not discharge, amounting to 1379*l.* approximately.

It was also disclosed that, the assets of the company having been realized, there was available to meet the costs and expenses of the liquidation and of the present proceedings, the remuneration of the liquidator and the claims of the pre-liquidation and post-liquidation creditors, the totally inadequate sum of approximately 800*l.*

A summons was taken out by the liquidator in the compulsory liquidation for the determination of the questions (1.) whether in the events which had happened (namely, of the voluntary liquidator having paid during his liquidatorship to certain only of the pre-voluntary liquidation creditors a dividend of 10*s.* in the £ on their respective debts, but without providing any dividend for others of them, and so as to leave an insufficiency of assets for meeting the claims of post-voluntary liquidation creditors who traded with the company) the assets in the hands of the applicant, as compulsory liquidator, ought to be distributed (*a*) first by paying the costs, charges and expenses of the liquidation ; (*b*) by paying the post-voluntary liquidation creditors pari passu inter se a dividend on the amount of their claims in priority to or to the exclusion of any payment to such of the pre-voluntary liquidation creditors as received no dividend ; or, alternatively, to equate their position with that of the post-voluntary liquidation creditors, or in any other and what manner; (2.) whether the voluntary liquidator was entitled to be paid remuneration as part of the proper costs, charges and expenses of the liquidation ; (3.) whether the applicant ought to take any and what steps to recover any and what part of the money paid by the voluntary liquidator to the pre-voluntary liquidation creditors.

H. E. Salt for the applicant.

E. C. Ryder for a post-liquidation creditor. My client gave credit to the liquidator and not to the company. The creditors in the post-voluntary liquidation are entitled to be paid in priority to the pre-voluntary creditors. He referred to Palmer's Company Precedents, 15th ed., vol. ii., p. 794.

C. D. Myles for a pre-voluntary liquidation creditor. The clear intention is to undertake contracts: see Palmer's

Company Precedents, vol. ii., form 280, at p. 335. The contracts are to be made by the liquidator himself. The statement on p. 794 of that volume is not supported by authority. He referred to Buckley on the Companies Acts, 11th ed., p. 424, and to *In re Wreck Recovery and Salvage Co.* (1), and *Bateman & Co.* v. *Ball* (2).

These cases are not conclusive on the point and suggest a contract between a liquidator and an outside creditor and not between a company and an outside creditor. A passage in Palmer's Company Precedents, vol. ii., at p. 334, suggests that if the liquidator did not adopt the contract of the company he would be personally liable. [He referred to the winding up rules: to Buckley on Companies at p. 875 and to s. 228 of the Companies Act, 1929.] It follows that (whether a liquidator acts under his own name or not is immaterial) the liquidator acts for the benefit of the company and the costs are payable not as a provable debt but as costs of the realizable assets. In any case, the liquidator cannot claim as a proving creditor. The invoices were all issued in the name of the company disclosing the name of the liquidator. He is the agent and is bound to discharge the debts in accordance with the law. The contract is between the company and the creditors. He referred to *In re Anglo-Moravian Hungarian Junction Ry. Co.* (3) and to *Ex parte Simmonds* (4).

I. J. Lindner for the voluntary liquidator. The remuneration of the voluntary liquidator should be costs out of the estate. There is no authority laying down a principle under which the liquidator is entitled to remuneration. In Palmer's Company Precedents, vol. ii., at p. 819, it is indicated that the position of a liquidator is similar to that of an agent.

E. M. Winterbotham; D. W. Markwick (for *P. R. D. Shufeldt*, on war service) for other parties interested.

Cur. adv. vult.

1941. Mar. 10. SIMONDS J. On March 24, 1938, the

(1) (1880) 15 Ch. D. 353.

(2) (1887) 56 L. J. (Q. B.) 291.

(3) (1875) 1 Ch. D. 130.

(4) (1885) 16 Q. B. D. 308.

directors of this company, which is now in compulsory liquidation, made a declaration of solvency under s. 230 of the Companies Act, 1929, and four days later a resolution was duly passed whereby it was resolved that the company should go into voluntary liquidation by way of a members' voluntary winding up and that the respondent Houstoun should be the liquidator. Houstoun, who had been a director of the company before 1931, when he resigned his directorship, and was by profession an accountant, duly assumed office as liquidator and in that capacity continued to carry on the business of the company until at least April 21, 1939. On that date the petition was presented to this Court upon which on May 8, 1939, an order was made for the winding up of the company by the Court. In the compulsory liquidation the applicant, F. E. Bendall, was in due course appointed liquidator. [His Lordship then stated the material facts disclosed by the applicant's investigation of the affairs of the company and continued :] It is in these circumstances that the question arises what are the rights of the two classes of creditors, and the further question whether Houstoun is entitled to be paid any and what remuneration out of the assets of the company? By virtue of s. 191, sub-s. 1 (*b*), and s. 248, sub-s. 1 (*b*), of the Companies Act, 1929, a liquidator in a voluntary winding up may without sanction carry on the business of the company so far as may be necessary for the beneficial winding up thereof. If in the proper exercise of this statutory power he incurs obligations, those to whom he incurs them are entitled to be paid out of the assets of the company in priority to its creditors at the commencement of the winding up. It cannot, in my judgment, make any difference whether the obligation be in respect of rent or rates or goods, if it is incurred in the due course of winding up and the condition is satisfied that the continuance of the business is necessary for the beneficial winding up: see *In re National Arms and Ammunition Co.* (1) and particularly the judgment of Bowen L.J. The test will be the same whether, as is the more usual case, the liquidator, having discharged the obligation, claims to be allowed it in his accounts, or, as here, the post-liquidation creditors, not having been paid, claim to rank in front of the pre-liquidation creditors. There can be no question of the two classes ranking pari passu: if the condition is satisfied the post-liquidation creditors come first; if not, they do not come in at all—at any rate until the pre-liquidation creditors have been satisfied. It is unnecessary to determine anything more than that. In the present case it has been contended that Houstoun, the voluntary liquidator, was not properly exercising his statutory power at any rate in carrying on the business for as long as he did, and that, therefore, the post-liquidation creditors cannot claim to be paid out of the assets of the company in priority to the pre-liquidation creditors. It is suggested that in that case they would have some claim against the liquidator personally; but that is a question which does not arise in these proceedings and I express no opinion upon it. In considering whether the liquidator was properly exercising his statutory power I am guided by the words of Sir George Jessel M.R. in *In re Wreck Recovery and Salvage Co.* (1), where, in regard to the identical language of s. 95 of the Companies Act, 1862, he says: "Now the word 'necessary' means that "it must not be merely beneficial but something more, though "the necessity must be determined by the Court, having "regard to all the circumstances of the case. It does not, of "course, mean that no other course would be possible. Then "it must be for the 'beneficial winding-up' of the business "of the company, ... not with a view to its continuance." The liquidator has sworn that at the time of his appointment as liquidator on March 28, 1938, he looked into the position of the company and came to the conclusion that the company would be able to pay 20s. in the £, provided that the assets could be gradually realized to advantage, and that he decided that it would be to the benefit of the creditors and also the shareholders that he should continue to carry on the business of the company; and he has further sworn that the carrying on of the business was a mercantile necessity and that it was carried on with a view to

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(1) (1885) 28 Ch. D. 474, 481.

(1) 15 Ch. D. 353, 360.

the beneficial winding up of the affairs of the company. Those statements have been somewhat vaguely challenged, but the deponent was not cross-examined nor, though his judgment has been criticized, has his integrity or good faith been impugned. I cannot, I think, disregard the fact that he assumed office upon a declaration of solvency, which means that the directors had formed the opinion that the company would be able to pay its debts for a period not exceeding twelve months from the commencement of the winding up. He was not bound to attach as little value to such a declaration as a judge who has administered company law for a period of years, and he had, in fact, as he says, come to the same conclusion himself after an investigation of the company's affairs. There was not, therefore, any apparent urgency to realize the company's assets, and he cannot, in my judgment, be held blameworthy for thinking, as he said he did think, that the continuance of the business was necessary to its beneficial winding up. It is easy to be wise after the event and to say that, at this point or that, he ought to have realized the danger or the undesirability of a further continuance, but it is fair to say that his hopes of a successful issue were largely disappointed, first, by the dislocation which followed upon the international crisis of September, 1938, and, secondly, by a false estimate, for which I cannot hold him responsible, of the value of a lease which appeared to be, but was not, a valuable asset of the company. On the whole then I have come to the conclusion that the liquidator properly exercised his statutory power of carrying on the business with a view to the beneficial winding up of the company. It is possible that had he been endowed with greater foresight he might have acted differently, but I do not think that Sir George Jessel meant by the words that I have cited that an objective standard should be set up after the event and by this the conduct of the liquidator judged. It is sufficient if he bona fide and reasonably forms the opinion that the carrying on of the business is necessary for the beneficial winding up of the company. His reasonable opinion, like that of other men, may be falsified by events.

SIMONDS J.

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It follows from what I have said that the post-liquidation creditors must be paid before any further payment is made to any pre-liquidation creditors. It follows, further, that I should not be justified in depriving the voluntary liquidator, Houstoun, of his proper remuneration, which will in the usual way be fixed by the Registrar in Chambers.

These proceedings have been instituted by the present liquidator, and the costs of all parties must be paid by him out of the assets in priority to any other claim.

Finally, I wish to make it clear that I express no opinion on the question whether the liquidator was justified in making any payment to pre-liquidation creditors without retaining sufficient money to satisfy all post-liquidation creditors, nor on the question whether any particular post-liquidation creditor gave credit to him or, as he says, looked only to the assets of the company.

Solicitors: *H. W. & S. Patey; H. Howard & Co.; Page, Moore & Page.*

J. L. D.

Distinguished. *In the Estate of* Hill (*decd.*). [1948] 2 All E.R. 489.

Approved. Barkway *v.* South Wales Transport Co., Ltd. [1948] 2 All E.R. 460.

Distinguished. In the Estate of Hill, decd. [1948] P. 341

MORTON J.

1941

Feb. 5.

PLOMIEN FUEL ECONOMISER COMPANY, LIMITED *v.* NATIONAL MARKETING COMPANY.

Evidence—Proof signed by person deceased—Passing-off action by company—Tester employed on company's apparatus—Statement in proof as to persons supplied—Whether tester "a person interested"—Proof not admissible—Evidence Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 28), *s.* 1.

A tester, employed by a company to test each apparatus sold by them, signed a proof relating to certain facts relevant in a passing-off action then pending in respect of the sale of similar articles by another company, but he died before the hearing:—

Held, that the proof was not admissible under the Evidence Act, 1938, as in the circumstances the tester was "a person "interested" within the meaning of s. 1, sub-s. 3, the general intention of which was that if a statement were put in evidence either it should be one made at a time when proceedings were not pending or anticipated involving a dispute as to any fact which it might tend to establish or it should be made by an independent person.

Semble : In the case of an action brought by a limited company every shareholder and director is "a person interested" in the result of the proceedings.

Witness Action.

Plomien Fuel Economiser Co., Ld., the plaintiffs, carried on the business of supplying a device known as the Plomien fuel economiser, the object of which was to reduce the amount of fuel used in any boiler to which it was fitted. National School of Salesmanship, Ld., sued as National Marketing Co., the defendants, carried on the business of supplying a device with a similar object known as the Fedino fuel economiser. The plaintiffs in this action alleged that the defendants had committed breaches of an agreement made between them in January, 1940, and that they had passed off their fuel economisers as the goods of the plaintiffs.

The defendants had issued a document headed: "Here "are a few of the many well known firms to whom the National "Marketing Company has supplied fuel economisers." While the action was pending the plaintiffs took a signed proof from one Hector Petrie, a tester in their employment, containing, among other things, a statement to the effect that the fuel economisers supplied to some of the persons named in that document were those of the plaintiffs and not of the defendants. His work was to carry out a test to ascertain the result achieved by the plaintiffs' fuel economiser in the case of each particular boiler sold. He died before the hearing of the action at which the plaintiffs tendered his proof in evidence. The defendants objected.

Shelley K.C. and *Aldous* for the plaintiffs. The proof is admissible. The deceased was not " a person interested " within s. 1, sub-s. 3, as " interested " must mean interested in the existence of the state of things to which he was testifying. He had no interest either in that or in the result of the action, which could not affect him.

Lloyd-Jacob for the defendants. The proof is not admissible. " Interested " means interested in the result of the proceedings and the deceased had an interest in that, for the more fuel economisers the plaintiffs sold the better it would be for him ; his importance as a tester and his remuneration might be thereby increased.

MORTON J. [after stating the facts :] So far as it is material, s. 1 of the Evidence Act, 1938, is as follows : " (1.) In any civil "proceedings where direct oral evidence of a fact would "be admissible, any statement made by a person in a document "and tending to establish that fact shall, on production of "the original document, be admissible as evidence of that "fact if the following conditions are satisfied, that is to say "(i.) if the maker of the statement . . . . (*a*) had personal "knowledge of the matters dealt with by the statement " (that is the fact in the present case) " . . . . and (ii.) if the "maker of the statement is called as a witness in the proceed-"ings : Provided that the condition that the maker of the "statement shall be called as a witness need not be satisfied "if he is dead . . . . (3.) Nothing in this section shall render "admissible as evidence any statement made by a person "interested at a time when proceedings were pending or "anticipated involving a dispute as to any fact which the "statement might tend to establish. (4.) For the purposes of "this section, a statement in a document shall not be deemed "to have been made by a person unless the document or the "material part thereof was written, made or produced by him "with his own hand, or was signed or initialled by him or "otherwise recognised by him in writing as one for the accuracy "of which he is responsible." (In the present case the proof in question was signed by Mr. Petrie.) " (5.) For the purpose "of deciding whether or not a statement is admissible as "evidence by virtue of the foregoing provisions, the Court "may draw any reasonable inference from the form or contents "of the document in which the statement is contained, or from "any other circumstances . . . . ".

In view of the terms of sub-s. 5, I have looked at the document in question; but, if I decide that it is not admissible in evidence, I shall, of course, dismiss its contents from my mind as allegations which have not been proved by evidence.

Mr. Shelley, for the plaintiffs, submits that Mr. Petrie was not "a person interested " within the meaning of sub-s. 3. At one time he contended also that the present action did not involve "a dispute as to any fact which the statement might tend to "establish "; but he abandoned this point and said that he was content to rely solely upon his first submission. I think that that abandonment was founded on good reasons, because the allegation which he seeks to establish by Mr. Petrie's proof was in fact opened by him as one of the facts on which he relied as proving passing-off or breach of contract by the defendants in this case, and the document which is said to have been issued by the defendants is now by amendment expressly pleaded in the statement of claim.

In my view, " a person interested " within the meaning of this sub-section must, in the context, mean a person interested in the result of the proceedings " pending or anticipated." It seems to me that a useful test, though perhaps not the only one, is: was it better for Mr. Petrie that the plaintiffs should succeed in the present action or was it a matter of indifference to him?

Applying that test, was he a person interested?

I do not know whether the salary paid to Mr. Petrie was quite irrespective of, or depended to some extent upon, the number of tests which he carried out for the plaintiff company; but it seems to me that it must be to the advantage of the plaintiffs' tester if they win this action instead of losing it. The object of the action is to prevent the plaintiffs' trade being damaged by what they say are unfair acts on the part of the defendants and it seems to me that a man whose employment consists of testing the Plomien fuel economisers must be benefited if the plaintiffs prosper and fuel economisers are sold by them and tested by him in increasing numbers. The amount of his work is increased, and I suppose that it is reasonable to infer that his importance to the company is increased, so that possibly in time, if not immediately, his remuneration might be augmented.

I think, therefore, that in this particular case, Mr. Petrie must be held to have been "a person interested," within the meaning of the sub-section, at the time when his proof was given and signed by him.

In the case of a limited company, it would seem clear that every shareholder is a person interested in the success of proceedings brought by that company; and so, I should think, is every director. Whether every servant of the company in every set of circumstances is necessarily "a person interested" is not a matter on which I have formed any concluded judgment. It may be that there are circumstances in which it might be said that a servant of the company was not "a person interested." As to that, I express no opinion; but I think that the general intention of the section is that, if there is put in evidence a statement to which, of course, no cross-examination can be directed, it should be either one made at a time when proceedings "involving a dispute as to any "fact which the statement might tend to establish" are not "pending or anticipated," or one made by what I may conveniently describe as an independent person.

For these reasons, I arrive at the conclusion that the document tendered as evidence is not admissible within the statute. I need hardly say that I have done so as a pure question of law without casting any reflection upon the accuracy of Mr. Petrie or the honesty of his statement.

Solicitors: *Simon, Haynes, Barlas & Ireland; Rowley, Ashworth & Co.*

F. C.

In re DIPLOCK.

WINTLE *v.* DIPLOCK.

[1940. D. 1041.]

C. A.
1941
Jan. 13, 14, 15.

Charity—Charitable bequest—Gift of residue—" Charitable or benevolent " object or objects "—Invalidity of gift.

A testator having by his will bequeathed certain pecuniary legacies to friends and servants and charitable legacies to certain charitable institutions, directed his executors to " apply the " residue for such charitable institution or institutions or other " charitable or benevolent object or objects in England " as they should in their absolute discretion select :—

Held, that the bequest of residue was void for uncertainty. It was well settled that a bequest for charitable or benevolent objects was void for uncertainty ; and on the construction of the will the word " or " could not be read as " and " or the word " benevolent " as covering no larger field in any respect than the word " charitable."

The principles laid down in *Morice* v. *Bishop of Durham* (1804) 9 Ves. 399 ; (1805) 10 Ves. 522, and passages from the judgment of Lord Parker in *Bowman* v. *Secular Society, Ld.* [1917] A. C. 406, 441, followed.

In re Ludlow. Bence Jones v. *Attorney-General* (1923) 93 L. J. (Ch.) 30 ; 129 L. T. 247, distinguished.

Decision of Farwell J. [1940] Ch. 988 reversed.

APPEAL from Farwell J. (1)

The testator, Caleb Diplock, who made his will on November 3, 1919, died on March 23, 1936. He had no near relations. By clause 2 of his will, he gave a legacy of 20,000*l.* to a friend, who predeceased him ; by clause 3 he bequeathed to the same friend a freehold estate ; by clause 4 he gave a legacy of 5000*l.* to another friend and some small legacies to servants. By clause 5 he provided : "I give the "following charitable legacies, free of duty, namely : To the "Princess Alice Memorial Hospital the sum of five thousand "pounds to be applied for the general purposes thereof. To "my executors the sum of twenty thousand pounds to be "distributed amongst such hospitals, homes and institutions "for officers and soldiers, wounded, maimed, blinded and "disabled in the recent war as my acting executors may in

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(1) [1940] Ch. 988.

"their absolute discretion select and to be paid in such manner "and in such shares and proportions as such executors in "their uncontrolled discretion shall think fit and proper." By clause 6, the testator provided: "I give the residue of "my property to my executors upon trust to sell or call in "the same, with power to postpone such sale or calling in "without being responsible for loss, and out of the proceeds "of such sale and calling in and out of my ready money my "executors shall pay my funeral and testamentary expenses "and debts and the legacies bequeathed by this my will and "the duty on any legacies hereinbefore given free of duty or "any codicil hereto and subject thereto shall apply the residue "for such charitable institution or institutions or other "charitable or benevolent object or objects in England as "my acting executors or executor may in their or his absolute "discretion select and to be paid to or for such institutions "and objects, if more than one, in such proportions as my "executor or executors may think proper." By clause 7 the testator provided: "I declare that the receipts of the treasurer "or other proper officer for the time being of any hospital, "home or other institution shall be a sufficient discharge for "any legacy bequeathed, given or applied thereto."

The executors distributed the residuary estate, which amounted to more than 250,000*l.*, among about one hundred and thirty charitable institutions. Subsequently it was suggested, on behalf of persons interested as next of kin of the testator, that the gift was invalid. Accordingly, on June 10, 1940, the executors took out a summons to determine whether the disposition of the residuary estate was a valid charitable gift.

Farwell J. came to the conclusion that the disposition of residue was a valid charitable trust because on the true construction of the will there was sufficient to indicate an overriding intention to benefit charitable objects only and that the use of the words " or benevolent object or objects " did not compel the Court to hold that the gift was invalid.

The next of kin appealed. The appeal was heard on January 13, 14, 15, 1941.

C. Romer K.C. and *Fawell* for the appellants. The inclusion in the residuary clause of the words "or benevolent" render the gift void for uncertainty. Farwell J. construed the word "benevolent" as meaning "charitable-benevolent" in which case the words are superfluous. He has in effect struck the word "benevolent" out of the will, when the recognized rule of construction is to give meaning to every word in a will if possible. There can be no reason for striking out a word, if that has the effect of diminishing the apparent scope of the testator's philanthropy. The view that a gift for charitable or benevolent objects to be selected by the executors is void for uncertainty is covered by authority dating back to 1804: *Morice* v. *Bishop of Durham* (1); *James* v. *Allen* (2); *Williams* v. *Kershaw* (3); *Ellis* v. *Selby* (4); *In re Jarman's Estate* (5); *In re Macduff* (6); *Hunter* v. *Attorney-General* (7); *Attorney-General for New Zealand* v. *Brown* (8). See also per Lord Parker in *Bowman* v. *Secular Society Ld.* (9). The words used here are precisely the same as those used in *In re Horrocks* (10). It is true that the Court there was not sitting as a Court of construction but that an attempt was being made to have "or" altered to "and" on the ground of its being a clerical mistake. There are, however, two material passages in the judgment (11).

On these authorities it is clear that the residuary gift looked at by itself is void for uncertainty as giving authority to distribute residue among objects that are not charitable. Further, the fact that the fund has in fact been distributed among charitable objects is immaterial. The learned judge has relied on other provisions of the will to assist him to his conclusion and says that after making gifts to friends and servants, the rest of the will was given up to charitable bequests. To say that is to beg the question in issue here. He also refers to the fact that the will contains a common form clause as to receipts by officers of charitable bodies but

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(1) (1804) 9 Ves. 399; (1805) 10 Ves. 522, 539.
(2) (1817) 3 Mer. 17.
(3) (1835) 5 Cl. & F. 111*n.*
(4) (1836) 1 Myl. & Cr. 286.
(5) (1878) 8 Ch. D. 584.
(6) [1896] 2 Ch. 451.
(7) [1899] A. C. 309.
(8) [1917] A. C. 393.
(9) [1917] A. C. 406, 441.
(10) [1939] P. 198.
(11) Ibid. 209, 217.

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that can have no possible bearing. There is nothing in any of these provisions to cut down the clear language of the residuary clause. The appeal ought therefore to be allowed.

Charles Harman K.C. and *H. H. King* (for *W. S. Wigglesworth,* on war service) for some of the charities concerned. These respondents stand for 130 charitable institutions to which the sum comprised in residue has been paid over. The Court is not driven to hold that what has been done is bad because " or " was used in place of " and." There is in the will a clear intention to benefit charities. When a testator speaks of " charitable or benevolent purposes " he means to help the poor or those in straitened circumstances. On the question of construction the Court has to look at the facts. These are that a gentleman of affluence without friends or near relations goes to a solicitor and prepares his will; and the position seems to be that a mistake was made in copying a precedent. The words used were never intended by the testator to extend beyond charitable objects.

The whole scheme of the will is for the benefit of charity.

The testator wished to benefit certain specific charities and to these he gave a legacy of 20,000*l.* and as to the residue he gave a wide discretion to his trustees to distribute it among charitable institutions and objects in England. In using the word " benevolent " the testator was simply repeating himself.

Secondly the word " or " as used here is not a true disjunctive. By " benevolent " he meant the same thing as " charitable."

The word " benevolent " in its popular sense means the same thing as charitable, and is often used of purely charitable institutions, e.g., the Bar Benevolent Association.

The Court should give a benignant construction to the will in favour of charity. If there are two possible interpretations of a document, the Court will, if possible, choose that one which makes it effectual and does not defeat the testator's intention ut res magis valeat quam pereat. *Von Brockdorff* v. *Malcolm* (1).

Where there is, as here, an overriding intention expressed in a will to benefit charity, but a power in the trustee to go outside it, the Court can and will cut out that power: *Hunter* v.

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(1) (1885) 30 Ch. D. 172.

Attorney-General (1) per Lord Davey. Another similar case was *In re Douglas* (2).

The general intention of the will is perfectly clear and should not be diverted by authorities decided on the construction of other wills: *In re Palmer* (3).

In this will the words "charitable" and "benevolent" are used in the same meaning. Many words change their meaning in the course of time and there is no reason why this Court should in 1940 construe the word "benevolent" in a particular sense because Lord Cottenham said that was its true meaning in 1837. The words "charitable" and "benevolent purposes" appear in the Friendly Societies Act and no one could doubt that there they mean charitable purposes: see *Dolan* v. *MacDermot* (4).

The words "or benevolent" are not necessarily fatal, occurring in a gift to charity: *In re Ludlow* (5). There a gift to hospitals or convalescent homes, or other charitable or benevolent institutions was held valid.

The testator, when he added these words at the end of this bequest, did not intend to extend the intention he had already expressed to benefit strictly charitable objects.

Sir Donald Somervell A.-G. and *A. Andrewes Uthwatt* for the Crown.

The decision in *In re Ludlow* (5) very nearly covers the present case. And see *Attorney-General for New Zealand* v. *Brown* (6).

The learned judge was right in saying that he was entitled, on this will, to treat the word "benevolent" as simply a synonym of "charitable." *In re Allen* (7) where the words were "charitable, educational or other institutions" and it was held there was a good charitable bequest.

Leonard Stone for the executors.

C. Romer K.C. replied.

SIR WILFRID GREENE M.R. Two matters fall to be considered

(1) [1899] A. C. 309.
(2) (1887) 35 Ch. D. 472.
(3) [1893] 3 Ch. 369, 373.
(4) (1868) L. R. 3 Ch. 676.
(5) (1923) 93 L. J. (Ch.) 30; 129 L. T. 247.
(6) [1917] A. C. 393.
(7) [1905] 2 Ch. 400.

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in this appeal: the true construction of the relevant parts of the testator's will, and the legal principles which ought to be applied to the will as so construed. Those principles are not in doubt. I propose to refer to three passages only out of the many authorities which have been cited to us. The first is to be found in the words of Sir William Grant in *Morice* v. *The Bishop of Durham* (1): "The question is, not "whether he" (the trustee) "may not apply it upon purposes "strictly charitable, but whether he is bound so to apply it." The next is to be found in the words of Lord Eldon in the same case (2). He says this: "But the true question is, "whether, if upon the one hand he might have devoted the "whole to purposes in this sense charitable, he might not "equally according to the intention have devoted the whole "to purposes benevolent and liberal, and yet not within the "meaning of charitable purposes, as this Court construes "those words; and, if according to the intention it was "competent to him to do so, I do not apprehend, that under "any authority upon such words the Court could have charged "him with mal-administration, if he had applied the whole "to purposes which according to the meaning of the testator "are benevolent and liberal: though not acts of that species "of benevolence and liberality, which this Court in the "construction of a will calls charitable acts." That passage was referred to by Lindley L.J., in this Court, in the case of *In re Macduff* (3). Lindley L.J. there says: "I take it that "that principle is as sound now as it was when Lord Eldon "announced it—he did not announce it for the first time." The third citation is from the speech of Lord Parker in the House of Lords, in *Bowman* v. *Secular Society, Ld.* (4). "A "trust to be valid must be for the benefit of individuals, which "this is certainly not, or must be in that class of gifts for the "benefit of the public which the Courts in this country "recognise as charitable in the legal as opposed to the popular "sense of that term. Moreover, if a trustee is given a "discretion to apply trust property for purposes some of

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(1) 9 Ves. 399, 406.
(2) 10 Ves. 522, 542.
(3) [1896] 2 Ch. 451, 465.
(4) [1917] A. C. 406, 441.

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"which are and some are not charitable, the trust is void "for uncertainty." Those principles I apprehend are really nothing more than the application of a fundamental principle of the law relating to trusts. In order that a trust may be properly constituted, there must be a beneficiary. The beneficiary must be ascertained or must be ascertainable. In the case of what I may call impersonal trusts, such as a gift to charitable purposes, or to benevolent purposes, there is no class of beneficiary which can be defined in the same sense as a class of beneficiaries such as a class of relatives. In the latter case, although no particular person in the class may be able to say that at any given moment he is entitled to anything out of the trust, the class as a whole can enforce the trust. Now in the case of charitable trusts in which no defined class is specified, nevertheless owing to the particular principles which have come to be applied to charitable gifts, the Courts have not treated the trust as failing for that reason. There is a very good ground for that, namely that the Crown, as parens patriæ taking all charities under its protection, is in a position to enforce the trust; and therefore, although there may be no specified charitable beneficiary who can come to the Court and insist on having the trust performed, nevertheless the Attorney-General can appear and is entitled to insist on the trust being carried out, if necessary, by a scheme cy près. But that exception to the general rule, that there must be beneficiaries ascertained or ascertainable—if I may call it an exception—does not extend beyond what falls within the legal class of charity. It does not extend to other public spirited purposes. Avoiding the word "benevolent" for the purpose of an illustration, I will take the word "philanthropic." The Crown has never assumed the right to come to the Court and ask for the execution of a philanthropic trust; it has only assumed the right to come to the Court and ask for the execution of a charitable trust, and accordingly, if there is a gift for philanthropic purposes, it suffers from the vice of not having a beneficiary, ascertained or ascertainable, in whose interest the Court can administer the trust. So much for the legal principles to be applied in deciding this appeal.

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The matter now becomes a pure question of construction, and in deciding that question of construction, it is perhaps unnecessary to say that the Court must not allow its mind to be deflected by any consideration of the consequences of its decision. What has happened since the death of the testator is entirely immaterial for the purpose of the decision of this case. The construction of the will remains the same to-day as it was at the moment after the testator's death, and nothing which has happened can alter it, nor can it be allowed in any way to affect our minds.

The rule of construction to be applied is, of course, the cardinal rule: that words are to be construed in their natural and grammatical sense unless there is something in the context of the will, read as a whole, which imposes a different meaning upon them.

In the present case the testator, after giving legacies to individuals, gives certain charitable legacies in clause 5, and in clause 6 he gives the residue of his property to his executors who are to apply it "for such charitable institution or "institutions or other charitable or benevolent object or "objects in England as my acting executors or executor may, "in their or his absolute discretion select, and to be paid to "or for such institutions and objects if more than one, in "such proportions as my executors or executor may think "proper"; and then follows clause 7, which only deals with the case of institutions, in which the testator declares that "the receipts of the treasurer or other proper officer for the "time being of any hospital, home or other institution, shall "be a sufficient discharge for any legacy bequeathed, given "or applied thereto." Taking that language and reading it in its natural and grammatical meaning, it does not seem to me to be open to doubt that the testator is giving to his trustees an option to apply his residue either, first to a charitable institution or institutions, or, secondly, to some other charitable object, or thirdly, to some benevolent object or objects. The word "or" is prima facie, and in the absence of some restraining context, to be read as disjunctive, and if a testator wishes to give his trustees a discretion to apply his property either to charitable or to benevolent objects, I do not myself know what word in the English language he can more suitably use than the word "or." I approach this question therefore on the view that the word "or" is prima facie to be read as meaning what it says. Mr. Harman, as one of the arguments which he put before us, invited us to construe the word "or" as meaning "and," or as meaning "id est," or, he said, it should be omitted altogether. I am quite unable to understand on what principle of construction, or indeed of common sense, it would be justifiable to apply such violence to the language of a testator. That words may be omitted, that they may even be changed in their meaning, or read in a meaning which is far from their natural meaning, if the context so requires it, is a truism; but I can find no vestige of a context in this will which would justify the Court in reading the word "or" in that way.

The next way in which Mr. Harman endeavoured to grapple with his difficulty related to the word "benevolent." In the first place he said that the word "benevolent" nowadays in its ordinary meaning to the man in the street, is confined to the relief of poverty or distress, which is of necessity a charitable object; and the result of that argument, if it were accepted, would be that the testator would have used the word "charitable" and followed it, as an alternative, with an object which was already included in the larger word which he had used. That by itself would not perhaps be surprising, if the construction of the words led to it. Mr. Harman invited us to hold that the word "benevolent" had changed its meaning, and had come to have that meaning to-day. The learned Attorney-General, if I followed his argument correctly, maintained that the word "benevolent" was now really co-extensive in meaning with the word "charitable," and he ingeniously suggested that that result had come about, not so much by a contraction of the meaning of the word "benevolent" as by an extension of the meaning of the word "charitable," so that the two now covered the same ground. It may very well be that nowadays objects which in the old days would not have been regarded as charitable, are now regarded by the Courts as charitable. That is not due, if it be the case, to any alteration in the legal meaning of the word "charitable." It is due to a different appreciation of social questions and matters of that kind. But even allowing for that argument, I am quite unable to accept the proposition either that the word "benevolent" means the same as the word "charitable" or that it covers part of the ground which is covered by the word "charitable," and does not extend beyond it.

The truth, in my opinion, is that the word "benevolent" in some respects covers less ground than the word "charitable" and in other respects covers more. The suggestion that there is some new-fangled modern meaning for the word "benevolent" is, I think, entirely displaced by a reference to two recent authorities, both decided in the year 1917; the first is *Attorney-General for New Zealand* v. *Brown* (1) where Lord Buckmaster, delivering the judgment of the Privy Council, said this: "It is obvious that the real obstacle that lies in the appellant's "path is due to the word 'benevolent.' In accordance with "a well-established series of authorities, beginning at least as "early as *James* v. *Allen* (2), a gift for benevolent purposes "is bad, because such purposes go beyond the legal definition "of charities—a word which, in the construction of wills, has "always possessed a limited and technical meaning. It is far "too late to question the soundness of these authorities at "the present day." Lord Parker, in the passage from *Bowman* v. *Secular Society, Ld.* (3), part of which I have already read, says: "A simple instance of this is a gift for "charitable or benevolent purposes. Such a gift is void, for "benevolent purposes are, as is well settled, not necessarily "charitable." I therefore reach this conclusion: that the word "benevolent," in its ordinary grammatical meaning, goes beyond the legal meaning of the word "charitable."

On that footing the next argument that was put before us was that even if that be so there is to be found in this will a context sufficient to give to the word "benevolent" a different and more limited meaning. I have searched this

(1) [1917] A. C. 393, 395.
(2) 3 Mer. 17.
(3) [1917] A. C. 406, 441.

will and I have listened attentively to the arguments which have been put before us, and I am no nearer to finding such a context now than I was at the beginning. It was said that in this will there was a context consisting of what was described as "an over-riding charitable intention." I am afraid that I do not appreciate the force of the word "over-riding" in this connection. If it means exclusive, it begs the whole question which has to be answered. If it merely means that the testator was a very charitable person, that charity was the first and principal thing that he was thinking about, it carries the argument no further. In order that it may have any force at all for present purposes, a context must be found which is sufficient to restrain and limit the natural meaning of the word "benevolent"; and that context is not to be found in the fact that the testator has given charitable gifts, nor in the fact that he has put his charitable gifts first, nor in the fact, if fact it be, that he had a preference for charitable gifts. Those circumstances appear to me to be quite insufficient to justify taking the words used (and we must assume deliberately used) by the testator, the normal meaning of which is beyond doubt, and giving them some quite different meaning to that which they normally bear. I ask myself once again: if a testator, however great his preference for charity, however great a bias in favour of charity his mind may have, is minded to add to that an intention to benefit benevolent objects, by what language other than the language which this testator has used, is he to accomplish his purpose?

The argument was also based very largely upon the case of *In re Ludlow* (1), a decision of this Court on appeal from Lawrence J. It must not be supposed for one moment from anything I have said, that in a proper context the word "benevolent" may not be given a meaning much more limited than that which it normally bears. A proper context in a will can place very remarkable meanings upon ordinary words; but I find no real assistance in considering totally different language in other wills which are referred to as

(1) 93 L. J. (Ch.) 30; 129 L. T. 247.

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showing how a context may alter the meaning of a word. That it can alter it is beyond doubt. Whether in any particular case it does alter it, is a question on the construction of the particular language used; and I find very little assistance in looking at different language in different wills. But as the case of *In re Ludlow* (1) was pressed upon us, I will make one or two short observations about it. The context there was of a totally different character to the context here. The gift was not a gift to institutions; it was not a gift to trustees to distribute among institutions of a specified character; it was a gift for a particular object, namely, putting it quite shortly, the setting up and endowment of hospital wards or beds. Such a purpose is unquestionably charitable and both Lawrence J. and this Court held that the object for which the money was to be applied, was a charitable object. The testator then went on to indicate the types of institution in which that charitable purpose could be effected by his trustees, and one of them was a benevolent institution. When once it is held that the purpose is a charitable purpose (e.g. the endowment of a hospital ward or bed) the fact that some particular class of institution in which the testator contemplates that that purpose may be achieved, does not happen to be an institution whose general objects are exclusively charitable, cannot have any material significance. A charitable purpose is not made non-charitable by indicating that one of the places where it may be performed or achieved is within the four walls of a non-charitable institution. In that case, when once it was decided that the purpose for which the money was to be spent was charitable, all difficulty seems to me to have disappeared.

There was one other authority relied upon and that was the case which I have already mentioned, the case in the Privy Council of *Attorney-General for New Zealand* v. *Brown* (2). It was suggested that the word "benevolent" there was only construed in the way in which it was construed by reason of something in the investment clause. In my opinion that is a misconception as to the reasoning of the Board. The passage in question, which I do not propose to read, was dealing with the argument that in a particular passage of the will the word "charitable" governed all the following adjectives. The phrase was "Such charitable benevolent religious and "educational institutions societies associations and objects" as his trustees should select. The argument, as I say, was that the word "charitable" governed all of them. That argument was rejected, but that argument never could have been put forward for one moment if there had been the disjunctive word "or"; if the gift had been for charitable or benevolent or religious or educational institutions, nobody could have said, as a matter of interpretation, that the word "charitable" governed the other words; it was only the absence of the word "or" that enabled that argument to be put forward at all. I get no assistance from the observations in that passage.

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(1) 93 L. J. (Ch.) 30; 129 L. T. 247

(2) [1917] A. C. 393.

That really disposes of the whole matter. As I follow the judgment of the learned judge in the Court below, although he does not express in terms the precise construction which he puts upon the words, the conclusion to which he came appears to be that the words "charitable or benevolent," must be read as meaning "charitable benevolent," that is to say, such charitable objects as are also benevolent. My first objection to that construction is that it involves striking out the word "or" or substituting for it the word "and"; and I have already given my reasons for thinking that no such violence can be done to the language of the will. The learned judge got over that difficulty by reading the will as a whole and finding in it an over-riding intention; and he did that by first construing the will with the omission of the words "or benevolent" and then asking himself whether the presence of those words introduced a non-charitable element into the testator's bounty. With great respect to the learned judge I think that he allowed himself to be misled by approaching the problem of construction in a way which is really not permissible. The problem before him was to construe the will as a whole, and if you take the vital and crucial words out of the will and make up your mind as to its meaning

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without them, and then ask yourself whether their presence makes any difference, you are apt to get the whole language into a false perspective, if I may say so with great deference to the learned judge. Instead of construing the language as a whole, you construe it only in bits and then put the bits together.

I have ventured to make those respectful criticisms of the judgment of the learned judge in order to explain why I disagree with his method of approaching the problem. In my opinion this appeal succeeds and the judgment below must be reversed and the appropriate declaration made.

CLAUSON L.J. I find myself in complete agreement with the judgment which has just been delivered by the Master of the Rolls. In regard to the first point which, for convenience, I may refer to as the point of law, I must confess I cannot bring myself to feel any doubt that, certainly in this Court, the matter is completely and entirely settled, and settled in the sense which my Lord has indicated.

As regards the question of construction, I need scarcely say that it is always with great hesitation that I differ from Farwell J., particularly in a matter of construction of this kind; but my reasons for differing from him have been completely and exhaustively expressed by my Lord, and I do not think that any useful purpose would be served by attempting to repeat them. I accordingly agree that the appeal should be allowed.

GODDARD L.J. I agree because the cases which have been cited, which are binding on this Court, make it impossible for the judgment below to be upheld. For myself, owing perhaps to the fact that I was not brought up in this branch of law, I cannot feel any enthusiasm for this rule. Indeed, when I find a rule which says that if property is left to trustees to give to charitable and benevolent purposes, that is good, but if it is for charitable or benevolent purposes, it is not, I regard it with some distaste. That was described by the Master of the Rolls in the recent case of *In re Horrocks* (1) as a trap

(1) [1939] P. 198.

into which the unskilled draughtsman not infrequently falls. For myself I cannot have any doubt that the draughtsman in this case fell into a trap, because it is obvious that Mr. Diplock's intention was to leave the money to charity in the popular sense of the term, and had it been pointed out to him when he said, "I want to leave it to charitable or "benevolent objects," "well, if you use those words the "money will not go to charity but to your first cousins once "removed" (of whose existence he himself probably did not know) then, provided Mr. Diplock was of sound mind and memory and understanding, there is not the least doubt in the world that he would have said, "Cut out the word "'benevolent.'" The fact that I do not regard this rule with the respect that one should ever pay to long existing rules is neither here nor there, and the cases oblige me to hold that this gift is void.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *White & Leonard and Nicholls & Co.; Thomas Eggar & Son; Treasury Solicitor; Preston, Lane-Claypon & O'Kelly.*

H. C. G.

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Mine—Coal mine—Lease—Assignment—Rents and royalties—Liability—" Mine owner "—Cost of statutory works—Deduction from rents and royalties—Construction of statute—Doncaster Area Drainage Act, 1929 (19 *&* 20 *Geo.* 5, *c. xvii.*), *s.* 12, *sub-ss.* 1, 3 ; *s.* 33.

A mining lease, being in fact an underlease, granted in 1911 by the Dalton to the Rossington company, contained covenants that the Rossington company and its assigns would pay rents and royalties free of deductions save landlord's property tax and mineral rights duty, and all taxes, rates, assessments and outgoings, and that they would perform the covenants and conditions contained in certain scheduled leases, so far as relating to the coal demised.

The Denaby company was constituted by a scheme confirmed in 1936 and under this scheme the lease became vested in that company which, since that date, had had to execute drainage requirements under the Doncaster Area Drainage Act, 1929.

Under s. 12, sub-s. 1, of the Act, mineowners incurring costs in constructing or maintaining drainage works required because of actual or apprehended subsidence, or having to pay money in respect of them, are entitled to deduct from the royalties payable by them the proportion of such expenditure determined to be proper. Under sub-s. 3, in such a case the sum reserved and payable under the lease is to be deemed to be the net amount arrived at after such deduction. A mineowner, within s. 33, is the owner, lessee, or other persons entitled to work and get minerals.

In 1939 the Dalton company began against the Rossington and Denaby companies an action for declarations that the Rossington and Denaby companies were and each of them was liable to pay to it the full amount of the rent and royalties due to it under the lease ; that the Rossington company was not a mineowner within the meaning of the Act (in the case before the Court, it was not contended that it was) ; that, as between the Dalton and Rossington companies, the sum reserved by and payable under the lease was the full amount therein provided, and not a reduced amount and that s. 12, sub-s. 3, of the Act had no effect as between the Dalton and Rossington companies ; and that, under the lease and the scheme, the Rossington and Denaby companies were and each of them was liable to pay to the Dalton company the rent and royalties due under the lease, clear of all deductions save landlord's property tax and mineral rights duty, to perform and observe the covenants and stipulations imposed on the Dalton company (including that to pay the rents) under the terms of the scheduled leases, and to keep the Dalton company indemnified against all actions, claims, demands and liabilities under those leases arising from the Rossington and Denaby companies, or either of them, exercising the rights, powers and liberties granted under the lease.

In 1940 the parties agreed a special case, which asked (inter alia) whether, on the true construction of the Act, the scheme, and the lease, the Rossington company was entitled to deduct from the royalties the proper proportion, as determined under the Act, of the Denaby company's costs incurred or sums paid thereunder :—

Held, that the Denaby company was a mineowner within the meaning of the Act and was therefore entitled to make the deductions authorized by the Act from the rent and royalties payable under the lease; that by virtue of s. 12, sub-s. 3, the net amount so arrived at was to be deemed to be the sum reserved by and payable under the lease, whether by the Rossington company as the original lessee or by the Denaby company as the assignee of the lease under the scheme; and therefore by the payment of that net amount by either company the obligations under the lease of both were fully performed; that the deduction was not a tax, rate or outgoing; that there was nothing against which the Dalton company could claim to be indemnified, and that it was not entitled to any part of the relief which it had claimed in the action.

Denaby and Cadeby Main Collieries, Ld. v. *Brodsworth Main Colliery Co., Ld.* (post, p. 289, note), considered and distinguished.

Decision of Farwell J. affirmed.

SPECIAL CASE.

This special case, based on an action begun in 1939, by Dalton Main Collieries, Ld. (hereinafter called "the Dalton "company") against Rossington Main Colliery Company, Ld., and Amalgamated Denaby Collieries, Ld. (hereinafter respectively called "the Rossington company" and "the "Denaby company") asked for a decision on the liability to pay rents and royalties under a mining lease (hereinafter called "the lease") and involved the construction of the Doncaster Area Drainage Act, 1929 (hereinafter called "the Act").

The lease was an underlease, made in 1911, of mines and minerals by the Dalton to the Rossington company. It became vested in the Denaby company under a scheme of partial amalgamation under the Mining Industry Act, 1926, confirmed on April 27, 1936, by the Railway and Canal Commission and hereinafter called "the scheme," whereby the Denaby company was constituted. Since 1936 the Denaby company had had to execute drainage requirements under the Act. The sections of the Act which the Court was asked to consider on the

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special case were s. 12, sub-ss. 1, 3, and s. 33, the definition section (1).

In the lease the Rossington company covenanted for itself and its assigns to pay rents and royalties free of deductions save landlord's property tax and mineral rights duty, and all taxes, rates, assessments and outgoings, and to perform, so far as relating to the demised coal, the covenants and conditions in certain leases scheduled to the underlease.

The action sought declarations: (i.) that the Rossington and Denaby companies were and each was liable to pay to the Dalton company the full amount of the rent and royalties due to the Dalton company under the lease; (ii.) that the Rossington company was not a mineowner within the meaning of the Act (which, in the special case, it was not alleged to be); (iii.) that, as between the Dalton and Rossington companies, the sum reserved by and payable under the lease was the full amount therein provided, and not a reduced amount and that s. 12, sub-s. 3, of the Act was not effective as between the Dalton and Rossington companies; and (iv.) that the Rossington and Denaby companies were and each was, under the lease and the scheme, liable to pay to the Dalton company the rent and royalties due under the lease, clear of all deductions save landlord's property tax and mineral rights duty, to perform and observe the covenants (including that to pay the rents) and stipulations imposed on the Dalton company under the scheduled leases, and to keep the Dalton company indemnified against all actions, claims, demands and liabilities under the scheduled leases arising from the exercise by the Rossington and Denaby companies, or either of them, of the rights, powers and liberties granted under the lease.

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(1) Sect. 12, sub-s. 1: "Where "in compliance with the pro- "visions of this Part of this Act "any costs are incurred by a "mineowner in constructing or "maintaining any drainage works "required by reason of sub- "sidence or apprehended sub- "sidence due to the working of "minerals (including any sums "paid by him towards any main- "tenance fund established by "him), or where in pursuance "of the said provisions a mine- "owner is required to pay to the "Central Board any sum in "respect of costs incurred by "the Board in the executing of "any such works, the mineowner "shall be entitled to deduct from "the royalties which any person "is entitled to receive in respect "of the minerals, such proportion "of the costs so incurred or of the "sum so paid as may be deter- "mined to be proper."

Sub-s. 2: "In ascertaining "what is the proper proportion "to be deducted under the fore- "going sub-section from any "royalties, regard shall be had "(amongst any other relevant "considerations) to the terms of "any contract between the mine- "owner and the royalty owner, "and to the benefit, if any, accru- "ing to the royalty owner by "reason of the expenditure in- "curred by the mineowner in pur- "suance of his duties and liabilities "under this Part of this Act."

Sub-s. 3: "In any case in "which the mineowner is entitled "under the provisions of this "section to make a deduction "from royalties the sum reserved "by and payable under the lease "shall be deemed to be the net "amount arrived at after making "such deduction."

Sub-s. 5: "In default of "agreement between a mineowner "and a royalty owner as to the "proper proportion to be deducted "from any royalties under this "section, or in default of agree- "ment between a surface owner "and a mineowner or the Central "Board, as the case may be, as to "any sum to be paid by the "surface owner under this section, "the question shall be referred to "an arbitrator to be appointed "by the Minister and the decision "of the arbitrator shall be final."

Sect. 33: "'Mineowner' means "the owner, lessee, or other "persons entitled to work and "get minerals; 'Royalty' in- "cludes every sum payable by "a mineowner (whether by way of "rent or other reservation and "whether by the acre or the ton "or otherwise) in respect of the "right to work and get minerals, "and 'royalty owner' means a "person entitled to receive a "royalty."

After writ in the action issued, the special case, on agreed facts, asked (inter alia) whether, on the true construction of the Act, the scheme and the lease, the Rossington company was entitled to deduct from the royalties the proper proportion, determined under the Act, of the Denaby company's costs incurred or sums paid thereunder.

Macaskie K.C. and *Beney* for the Dalton company. Sect. 12 of the Act envisages only a "mineowner" on the one hand and a "royalty owner" on the other. It does not take any account of the position of other persons interested in the minerals, either as intermediate lessors or lessees: *Denaby and Cadeby Main Collieries, Ld.* v. *Brodsworth Main Colliery Co., Ld.* (1). Sub-sect. 3, therefore, should be regarded as confined to "mineowner" and "royalty owner," and not as affecting a lessee who is not a mineowner. The object of the sub-section is purely ancillary to the right of deduction given by sub-s. 1: and sub-s. 3 is inserted probably to ensure that income tax Schedule A is payable only on the net amount of the rent. To construe sub-s. 3 as reducing the rent contractually payable by the lessee who has assigned the term, though grammatically possible, is to give it a meaning out of line with the general intention of the section.

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(1) Post, p. 289, note.

By clause 11 of the lease the Rossington company covenants to perform the covenants which, under the specified leases, have to be performed by the Dalton company, including the covenant to pay the rents reserved under the specified leases, save only that it has to pay the rents directly to the head lessors. These rents are the same as the full rents reserved in the lease, and the Dalton company has no right of deduction. Hence, apart from s. 12, the defendant companies, under clause 12 of the lease, have to pay the full rent. That clause is really a covenant of indemnity against the Dalton company's liability to its superior lessors: *Hornby* v. *Cardwell* (1).

Charles Harman K.C. and *Lindsay M. Jopling* (for *Montgomery White*, on war service) for the Rossington and Denaby companies. On the true construction of the lease there is no obligation on either of the defendant companies, by reason of the form of the covenants, to pay this extra amount. That point was dealt with obiter by the Court of Appeal in *Denaby and Cadeby Main Collieries, Ld.* v. *Brodsworth Main Colliery Co., Ld.* (2). Sect. 12, sub-s. 3, is a perfectly general provision. Where someone who is entitled so to do purports properly to reduce the rent payable under a lease, the reduction is to all intents and purposes effective. It cannot be right for the same lease to reserve a different rent to two persons, which is what is alleged to have happened in the present case.

Sub-sect. 3 is really needless, unless it was intended to provide for just such a case as has arisen here.

Macaskie K.C. and *Beney* in reply. When a mineowner has made his deduction, he has, by so doing, exhausted any right or privilege which he may have under the Act. [They referred to *Tozer* v. *Viola* (3)].

(1) (1881) 8 Q. B. D. 329.
(2) Post, p. 289, note.
(3) [1918] 1 Ch. 75.

FARWELL J. This matter comes before the Court in the form of a special case. The proceedings were commenced by a writ dated August 15, 1939, whereby the Dalton company claims as against the Rossington and Denaby companies declarations: (*a*) that the Rossington and Denaby companies are and each of them is liable to pay to the Dalton company the full amount of the rent and royalties due to the Dalton company in accordance with the terms of the lease and of the scheme; (*b*) that the Rossington company is not a "mine-owner" within the meaning of the Act; (*c*) that, as between the Dalton and Rossington companies, the sum reserved by and payable under the lease is the full amount therein provided and not any reduced amount and that the provisions of s. 12, sub-s. 3 of the Act have no effect as between the Dalton and Rossington companies; and (*d*) that, under clauses 9, 11 and 12 of the lease, and by the terms of para. 9 of the scheme, the Rossington and Denaby companies are and each of them is liable to pay to the Dalton company the rent and royalties due under the lease clear of all deductions except landlord's property tax and mineral rights duty, and also to perform and observe all the covenants and stipulations imposed on the Dalton company (including the covenant by the Dalton company to pay the rents) under the terms of the leases specified in the first schedule to the lease, and also to indemnify and keep indemnified the Dalton company against all actions, claims, demands and liabilities under the specified leases arising from the exercise by the Rossington and Denaby companies or either of them of the rights powers and liberties granted under the lease.

That writ having been issued, the parties agreed the material facts, which have been set out in the form of a special case containing at the end the questions submitted to the Court. The special case is, of course, agreed, and it will be convenient if I refer to it at once, although I may later have to refer more particularly to certain of the documents mentioned in it.

The special case is in this form: "1. By several leases "(hereinafter called 'the specified leases'), particulars of "which (containing the date the parties and term granted) "are set out in the first schedule to the underlease hereinafter "mentioned and therein numbered consecutively I. to VIII., "certain beds or seams of coal were demised to the plaintiffs "for the several terms of years mentioned in the said first "schedule, at the respective rents and royalties and subject to "the respective covenants and conditions in the specified leases "contained. 2. By an underlease (hereinafter called 'the "'underlease') dated July 31, 1911, and made between the "plaintiffs of the one part and the first defendants of the other "part the plaintiffs demised unto the first defendants certain "beds or seams of coal demised by the specified leases, together "with liberty to work and get the same and other rights "and liberties, for the respective residue then unexpired of "the several terms of years for which the properties were held "under the specified leases (less the last seven days of such "respective terms of years), subject to the rents and royalties "and the covenants on the part of the first defendants by "and in the underlease reserved and contained. 3. The "properties comprised in the underlease consisted of all the "property demised by each of the specified leases numbered "I., II., IV., V., VI., VII. and VIII. in the said first schedule "thereto and part of the property demised by the specified "lease numbered III. in such first schedule. The rents and "royalties reserved by the underlease included in respect of the "properties comprised in the said five specified leases numbered "I., II., IV., V. and VI. minimum rents of the same respective "amounts and royalties at the same respective rates as those "reserved by such five specified leases respectively. In the "case of the part included in the underlease of the property "comprised in the said specified lease numbered III., which "reserved a minimum rent calculated according to the area of "such property, a proportionate minimum rent was reserved "by the underlease in respect of the area of the part of such "property included therein; and a footage royalty was reserved "by the underlease at the rate payable under such specified "lease. As regards the underlease of the properties respectively comprised in the said two specified leases numbered

"VII. and VIII., footage royalties were reserved by the under-"lease at the rates reserved by such specified leases respectively, "but no minimum rent was reserved by the underlease in respect "of either of the last-mentioned properties. In addition "to the rents and royalties referred to in this paragraph the "underlease contained (in clause 7 thereof) provisions for the "payment by the first defendants to the plaintiffs of the "additional royalty therein mentioned. 4. By the underlease "the first defendants for themselves and their assigns cove-"nanted with the plaintiffs that the first defendants (clause 9) "would pay the rents and royalties reserved by the underlease "clear of all deductions (except landlord's property tax and "mineral rights duty); (clause 10) would pay all existing "and future taxes rates assessments and outgoings of every "description for the time being payable by the occupier in "respect of the premises thereby demised or any lands buildings "or works built constructed, occupied or used in exercise "of any of the liberties thereby granted or in respect of the "rents thereby reserved or any of them (except landlord's "property tax and mineral rights duty); (clause 11) would "during the term thereby granted perform and observe all the "covenants and stipulations by the lessees and conditions "respectively contained in the specified leases so far as such "covenants stipulations or conditions respectively related to "or concerned the coal and hereditaments thereby demised "and ought to be performed and observed by the first defend-"ants except that the first defendants should not be liable "to pay directly to the superior lessors any of the rents or sums "of money reserved by or payable under the specified leases; "and in case the first defendants should (with the concurrence "of the plaintiffs which they might revoke at any time if they "thought fit) pay to the superior lessors or any of them any "of the rents or sums of money reserved by or payable under "the specified leases, the first defendants should immediately "thereafter produce to the plaintiffs or their agents the receipts "or vouchers for such rents or sums of money so paid; and "(clause 12) would keep the plaintiffs indemnified against "all actions claims demands and liability in respect of the

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"exercise of the rights powers and liberties thereby granted "save and except that the plaintiffs should be liable to pay "to their superior lessors the rents royalties and sums of "money reserved by and payable under the specified leases "unless with the said concurrence of the plaintiffs they were "paid to the superior lessors direct. The underlease also "contained (clause 19) a covenant by the plaintiffs with the "first defendants (in addition to the usual covenant for "quiet enjoyment) that the plaintiffs would duly pay and "discharge all rents royalties and sums of money reserved by "or payable under and would perform and observe all the "covenants and stipulations performable and observable by "the plaintiffs under the specified leases (other than such as "the first defendants thereby covenanted to perform and "observe) and would keep the first defendants indemnified "against all claims demands and liability in respect thereof.

"5. The second defendants were incorporated in pursuance of a "scheme (hereinafter called 'the scheme') for the partial amalgamation of the constituent companies therein mentioned "(including the first defendants) under the Mining Industry "Act, 1926, Part I., and the Coal Mines Act, 1930, Part II., "which was duly confirmed by the Court of the Railway "and Canal Commission on April 27, 1936. By clause 4 of the "scheme it was provided that upon the appointed day (now past) "there should vest in the second defendants (therein referred "to as 'the new company') the properties therein mentioned "including (inter alia) all the leases and licences to get minerals "set out in the schedule to the scheme (one of which was the "underlease), and that the new company should take the "property which would vest in it under that clause subject "as therein mentioned and in particular 'in the case of leases "'or licences to get coal then subject to the terms of such "'lease or licence as modified or extended by any subsequent "'agreement.' Clause 9 of the scheme (so far as material "for the purposes of this case) is in the following terms:— "'The new company shall keep and perform the covenants "'contained in the several leases under which the leasehold "'properties vested in them by this scheme are held. The new "'company shall be under the same liability to the lessors "'of the said leases as they would have been had the same "'been assigned to it by deed and shall enjoy the benefit "'of all the terms and covenants contained in the said leases or "'in any agreement or agreements modifying or extending "'the same in the same way as the respective constituent "'company was entitled to do and shall have the same right to "'recoup short workings. The constituent companies "'shall not be relieved of their primary liability to the "'lessors as the lessees under the said leases but the new "'company shall indemnify the constituent companies "'against all claims and liabilities arising out of the said "'leases whether for rent or otherwise in so far as they relate "'to properties which under this scheme vest in the new "'company.' 6. There has been a surrender of the coal "demised by the specified lease number IV. and since the confirmation of the scheme certain transactions affecting specified "lease number II. or the portions of the demised premises "comprised therein, resulting in certain modifications of the "rents and royalties payable under the underlease, have taken "place; but the details of these transactions are not material "for the purposes of this case. 7. By virtue of the underlease "and the vesting thereof in the second defendants effected "by the scheme the second defendants are 'mineowners' "within the meaning of the Doncaster Area Drainage Act, "1929 (hereinafter referred to as 'the Act'). By s. 33 of the "Act 'mineowner' is defined as meaning 'the owner lessee "'or other persons entitled to work and get minerals.' In "accordance with the obligations imposed on the second "defendants by s. 9 of the Act they have as mineowners working "or proposing to work minerals carried out certain works of "the nature specified in the said s. 9 in connection with portions "of the premises comprised in and demised by the underlease. "In these circumstances and subject to the operation of clauses "9 to 12 of the underlease (if any) the second defendants have "become entitled under s. 12 of the Act to deduct from the "'royalties' (as defined by the Act) payable under the under-"lease and pursuant to clause 9 of the scheme to the plaintiffs "(who are for this purpose 'royalty owners' within the meaning "of the Act) a proper proportion (determined in accordance "with the provisions of the said s. 12) of the cost of the said "works. The first defendants have ceased to be 'mineowners' "and to work or propose to work minerals. By sub-s. 3 of the "said s. 12 it is provided as follows: 'In any case in which the "'mineowner is entitled under the provisions of this section "'to make a deduction from royalties the sum reserved by and "'payable under the lease shall be deemed to be the net "'amount arrived at after making such deduction.' By s. 33 "of the Act the expression 'royalty' is defined as including "'every sum payable by a mineowner (whether by way of "'rent or other reservation and whether by the acre or the ton "'or otherwise) in respect of the right to work and get minerals.' "The proportion of the said costs which the second defendants "are entitled to deduct as aforesaid has not yet been determined."

Three questions are submitted for the opinion of the Court. First, "whether on the true construction of the Act and in the "events hereinbefore stated the royalties (as defined in the "Act) reserved by and payable under the underlease are as "between the first defendants and the plaintiffs to be deemed "to be the net amount arrived at after making such deduction "therefrom as the second defendants may be entitled to make "under s. 12 of the Act and the liability of the first defendants "to the plaintiffs under the underlease in respect of royalties "(as so defined) is to be treated as reduced accordingly by the "amount of such deduction as aforesaid"; secondly, "whether "upon the true construction of the underlease and in the "events aforesaid the defendants or either of the defendants "are bound notwithstanding the provisions of the Act to "pay to the plaintiffs or on their behalf, by way of indemnity "or otherwise, the full amount (without any such deduction "as aforesaid) of the rents and royalties expressed in the "underlease to be payable by the first defendants to the "plaintiffs (as varied by the transactions mentioned in para. "6 hereof) or the amount of the said rents and royalties "less some only and if so what part or proportion of such "deduction"; and, thirdly, "whether or not in the events "aforesaid and upon the true construction of the Act the "scheme and the underlease the first defendants are entitled "to deduct from the royalties which the plaintiffs are "entitled to receive such proportion of the costs incurred or "sums paid under the Act by the second defendants as may be "determined to be proper in accordance with the provisions "thereof."

That being the special case, it becomes necessary to determine the questions raised, and it will be convenient to sum up very shortly the position as it emerges from these facts. The Dalton company is the lessor of the mines and minerals in question. It is itself a lessee from a head landlord. That is not very material, but it should be borne in mind that, while it is itself a lessee, it is, as between itself and the Rossington company, the lessor. On July 31, 1911, the Dalton company granted to the Rossington company an underlease; that is, the lease of the mines and minerals in question, to which I may have to refer again for the exact language of some of it. In 1929 there came into force the Doncaster Area Drainage Act, 1929, the provisions of which I shall have to consider again in a moment. On April 27, 1936, the scheme by which the Denaby company was constituted was confirmed by the Court of the Railway and Canal Commission, and since that time the Denaby company has been called upon to do certain things required for drainage purposes under the Doncaster Area Drainage Act, 1929. The exact amount which it is entitled to deduct from the rent under the Act has not yet been determined and will ultimately have to be determined by arbitration as provided by the Act itself.

As I understand the form of the special case, it is no longer disputed that the Denaby company is the mineowner within the meaning of the Act, nor could it, I think, be seriously contended, in the face of the decision of the Court of Appeal in *Denaby and Cadeby Main Collieries, Ld.* v. *Brodsworth Main Colliery Co., Ld.* (1), at any rate before me, that the Denaby company is not the mineowner in question. Under

(1) Post, p. 289, note.

the provisions of the Act the Denaby company is entitled to deduct from the rent which would otherwise be payable to the Dalton company (which, I think, is quite clearly the royalty owner and, as such, entitled to the rent) the proper sum when ascertained. That, however, does not overcome the difficulty. It is argued that the Rossington company is not in any sense relieved of its liability to pay the full rent to the Dalton company, and that whatever deduction the Denaby company may be entitled to make under the Act cannot relieve the Rossington company of the contractual liability contained in the lease granted to it by the Dalton company. It must be borne in mind that this is not a case of a sub-lease granted by the Rossington to the Denaby company. It is not a case where there is a superior landlord, a tenant under that superior landlord, and then a sub-lease by the tenant to another person. That is not the position. Here, the Dalton company is the lessor. The Rossington company is the lessee, and, by virtue of the scheme, the Denaby company is the assignee of the Rossington company. Thus, there is no question of separate leases, of a lease and an underlease, or anything of that kind. As between the parties to the action, it is a case of a lease and an assignment of that lease to the Denaby company.

It is, I think, desirable to ascertain now the exact effect of the Doncaster Area Drainage Act, 1929. I do not propose to refer to it in very great detail. Its purpose, as stated in the preamble, is to make provision for the better drainage of a certain area, in which these particular mines are situate, and Doncaster District Drainage Board is constituted. That board is given certain powers, and has exclusive powers and jurisdiction in respect of certain rivers. Sect. 4 gives the Central Board general supervision of the drainage of the Doncaster district.

I can now pass on to ss. 9, 10 and 12 of the Act. Sect. 9 imposes upon mineowners the obligation to execute certain works necessitated by subsidence. Sub-s. 1 provides: "subject to the provisions of this Part of this Act, it shall be "the duty of every mineowner working or proposing to work "minerals under any lands situate within the Doncaster "district, or so near thereto that the surface of any lands in "the said district will or may be affected by the working of "the minerals, to construct and maintain in proper condition "such works and do such things as may, by reason of any "subsidence which results or may result from the working "of the minerals be requisite, in order to obviate or remedy, "so far as having regard to all the circumstances of the case "is reasonably necessary, any loss of efficiency which has "arisen or may arise in the drainage system and drainage "works of the Doncaster district." Sub-s. 2 provides: "It shall be the duty of every such mineowner to comply "with such reasonable directions as may from time to time "be given to him by the Central Board with respect to the "construction or maintenance of any drainage works which "he is required under this Part of this Act to construct or "maintain, or with respect to the making of the necessary "financial provision for securing the due construction of any "such works, and the Central Board may at any time by notice "require any such mineowner to prepare and to submit to "the Board within such reasonable time as may be specified "in the notice a scheme with respect to any works of con- "struction or maintenance required to be executed by him "in pursuance of his obligations under this Part of this Act."

Then there is a provision for the mineowner making default, and a provision with regard to producing plans, and matters of that kind.

Sect. 10 provides for the establishment of funds by mine-owners for the maintenance of works. Sub-s. 1 is: "Every "mineowner who, under the provisions of the last foregoing "section, is liable to construct any drainage works shall— "(*a*) establish and maintain such a fund as will in the opinion "of the Central Board be sufficient to produce in perpetuity "an income of such an amount as will be required to provide "such sums as may from time to time be necessary for the "maintenance, so far as is reasonably necessary, of the said "works after the mine has permanently ceased to be worked; "(*b*) keep and, on demand, produce to the Central Board "proper accounts showing the cost of maintaining the said "works; (*c*) on demand, produce to the Central Board such "particulars as they may require with respect to the investments or securities constituting the fund and the persons "in whom the fund is vested, and otherwise with respect to "the sufficiency of the fund." Sub-s. 2 is: "Every fund "established in pursuance of the requirements of this section "shall, subject to the provisions of this section, be deemed "to be held in trust for the Central Board." Sub-s. 3 is: "Until the mine permanently ceases to be worked the mine-"owner may, from time to time, with the consent of the "Central Board, change the investments or securities con-"stituting the fund, and any income arising therefrom shall "belong to the mineowner for his own use." Sub-s. 4 is: "On the mine permanently ceasing to be worked, the persons "in whom the fund is then vested shall, in accordance with "such directions as may be given by the Central Board, transfer "the fund to the board, and the works constructed as aforesaid "by the mineowner, including any plant belonging thereto, "shall by virtue of this Act vest in and become the property "of the board, and thereupon the obligation of the mineowner "to maintain the said works shall cease."

Sect. 12 is the really important section in this case. [His Lordship read it, and continued:] I need not, I think, refer to any other provision in the Act except s. 33 (the definition section). [His Lordship read it, and continued:] As I have already said, it is, in my judgment, quite clear, under the Act and from the case of *Denaby and Cadeby Main Collieries, Ld.* v. *Brodsworth Main Colliery Co., Ld.* (1), that the Denaby company is the mineowner within the meaning of the Act, and is the only company at present entitled to work and get the mines and minerals in question, and therefore comes exactly within the definition of "mineowner" in the Act. It is equally clear that the Rossington company is not the mineowner. It is the assignor of the lease. It has not now, and does not claim to have, any right to work and get the mines and minerals. In my view it is quite plain,

(1) Post, p. 289, note.

in those circumstances, that the Denaby company is the mineowner in question. Indeed, that is not disputed in the special case, and is in accordance with the decision in *Denaby and Cadeby Main Collieries, Ld.* v. *Brodsworth Main Colliery Co., Ld.* (1). That being so, the Denaby company is entitled, having regard to s. 12 of the Act, to make a deduction from the amount of the royalties, or, in other words, from the rent for which it is liable, and the amount of the deduction, if not agreed, is a matter to be determined by arbitration as provided by the Act.

The rent under the lease—again I must stress the fact that there is only one lease in this case—is payable to the Dalton company, which, therefore, is the royalty owner within the meaning of the Act: and it would seem reasonably clear that, as between the Denaby and Dalton companies, the Denaby is entitled, as against the Dalton company, to the benefit given by s. 12 of the Act. The Denaby company is the person who has been called upon to do, and has done, certain works which have cost it money, and it is entitled to make a deduction accordingly from the rent payable. It is said, however, that, if that be so, and assuming that the Denaby company is entitled to make a deduction, that does not relieve the Rossington company from its liability as assignor to pay to the Dalton company the full amount of the rent. It is to be noted, when one looks at s. 12, that sub-s. 1 seems to make it reasonably clear that a deduction from rent or from royalties is in terms provided for as between the mineowner and the royalty owner: and, if the only persons who are to be affected by that are the royalty owners and the mineowner, sub-s. 3 would seem to be redundant.

Whatever the effect of sub-s. 3, it is plain that the sum reserved by and payable under the lease shall be deemed to be the net amount arrived at after making that deduction. No doubt that means that the rent, as between the mineowner who is liable to pay and the royalty owner who is entitled to receive it, must be treated for all purposes as being the amount reserved by the lease, but subject to the deduction under the

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(1) Post, p. 289, note.

Act. It is said that that cannot affect the Rossington company, which must remain liable under the lease, as between itself and the Dalton company, to pay the full rent. I think that it was sought to obtain some support for that proposition from *Denaby and Cadeby Main Collieries, Ld.* v. *Brodsworth Main Colliery Co., Ld.* (1).

That decision, however, although of the greatest importance to me in determining who is the mineowner within the meaning of this Act, does not, in my judgment, assist me in arriving at a conclusion on this question in this case. It must be borne in mind that, in that case, there was a lease and a sub-lease. What was said in that case was that, although the sub-lessee as the mineowner was entitled to a reduction of the rent as against his lessor (that was, the sub-lessor), the sub-lessor had no right to make any corresponding deduction from the rent which he had to pay to his landlord. But, of course, in that case the rent payable under the sub-lease, although the actual figure may have been the same, was not, in fact, the rent which the sub-lessor had to pay to his lessor. It was a sum of money reserved in each case by a separate document, by a separate lease, and although it was decided that the mineowner could deduct as against his royalty owner, it was held that the royalty owner had no right as against his lessor to make any similar deduction.

If the facts were the same in this case as they were there, I should, of course, follow that decision. In my judgment, however, they are quite different. Really, that part of the case which deals with the rights as between the lessor and his lessee are not relevant, as it seems to me, to the considerations which arise in this particular case. Here the position of the parties is that the Rossington company is liable by the terms of the lease to pay the rent thereby reserved to the Dalton company, and it will be desirable to look for one moment at the terms of the lease. It provides: " . . . . the Rossington company "—the first defendants—"for themselves and their "assigns, hereby covenant with the Dalton company that the "Rossington company . . . . 9. Will pay the rents and

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(1) Post, p. 289, note.

"royalties hereby reserved on the days and in the manner "hereinbefore appointed for payment thereof respectively "clear of all deductions (except landlord's property tax and "mineral rights duty)."

By virtue of the assignment contained in the scheme approved by the Court of the Railway and Canal Commission the rents and royalties reserved under the lease and payable by the Rossington to the Dalton company, are, by virtue of that scheme, as between the Rossington and Denaby companies, now payable by the Denaby to the Dalton company. The Rossington company, however, is not thereby relieved of its liability to pay the Dalton company. If, however, the rent under the lease is paid in full and is received by the Dalton company, the liability of both the Rossington and Denaby companies, so far as rent is concerned, is satisfied. It is the same rent which has to be paid to the Dalton company, by one or other of the two defendant companies, and the Dalton company is entitled to it; but, in my judgment, it is impossible to say that the rent, although reduced by the provisions of s. 12 of the Drainage Act, is not the same rent as that payable by the Denaby to the Dalton company. The Denaby company, having a right to the deduction provided by the Act, is entitled to that benefit as against the Dalton company, and, having paid that rent, has discharged, on behalf both of itself and of the Rossington company, the liability to pay the rents reserved by the lease. In my judgment, it is impossible to escape from the effect of the provisions of s. 12 of the Act, especially sub-s. 3. There is one rent payable under this lease. That rent is deemed to be the net amount arrived at after making the deduction: and, so far as the defendant companies are concerned, there has been no default at all, because the Dalton company will receive the rent reserved by the lease, which, however, will be less than the full amount, by reason, not of any default on the part of either defendant company, but of the effect of the Act, which enacts that, after the happening of the events provided for in the Act, the rent shall be reduced. In my judgment, so far as the question of liability for the rent is concerned, so

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long as the Dalton company receives the full amount, less any proper deduction made under s. 12 of the Act, it has no cause to complain against either defendant company, or to say that either defendant company has made default in the performance of the obligation to pay the rent.

It is further said that, even so, the Rossington company is liable under clause 10 of the underlease because it covenanted to pay all existing and future taxes, rates, assessments and outgoings of every description. In my judgment, it cannot really be suggested that this deduction which the Act permits comes within any of those words. It is not a tax: it is not a rate; and it is not an outgoing which can possibly come within clause 10. The Denaby company has had to do certain work and provide certain moneys, and it has found those moneys. To suggest, however, that the deduction which the Act permits comes within any of those words seems to me to be a contention which cannot be supported.

Then reliance is placed on clause 11, which is in these terms: "Will, during the term hereby granted, perform and observe "all the covenants and stipulations by the lessees, and con-"ditions, respectively contained in the specified leases so far "as such covenants, stipulations, or conditions respectively "relate to or concern the coal and hereditaments hereby "demised, and ought to be performed and observed by the "Rossington company, excepting that the Rossington company "shall not be liable to pay directly to the superior lessors any "of the rents or sums of money reserved by or payable under "the specified leases; And, in case the Rossington company "shall (with the concurrence of the Dalton company which "they may revoke at any time if they think fit) pay to the "superior lessors, or any of them, any of the rents or sums "of money reserved by or payable under the specified leases, "the Rossington company will immediately thereafter "produce to the Dalton company or their agents the receipts or "vouchers for such rents or sums of money so paid; . . . ." Again, it seems to me impossible to suggest that there is anything against which the Dalton company is entitled to say that it should be indemnified. If I am right in the view which I have taken, when the Dalton company receives at the full rent less the deduction permitted and provided for by the Act, both defendant companies have fully performed the obligations contained in the lease to pay the rent in question, and the fact that there has been a deduction does not give the Dalton company any right to claim any payment from either defendant company on the ground that it is an outgoing or anything of that sort, or on the ground that there has been a failure by the lessees to perform and observe the covenants and stipulations in the lease.

In my judgment, the answer to that part of the case must be that the defendant companies, by paying, or seeing that there is paid, to the Dalton company the full amount of the rent less the deduction permitted by the Act, have carried out to the full the obligation on both of them to pay the rent reserved by the lease. The Dalton company, therefore, is not entitled to make any further claim in respect of the rent payable under the lease. As I have said, the case seems to me to be totally different from that of a lease and sub-lease. There, as I have pointed out, there are two rents which need not necessarily be the same: they are payable under two different documents, and because in the case of a sub-lease the sub-lessee is entitled, being the mineowner, to deduct from the rent payable to the royalty owner (in that case the sub-lessor), the fact that the sub-lessor is not entitled to pass on that deduction when he comes to pay the rent under his lease seems to me to have no bearing on the facts of this particular case.

I can see no ground on which the Dalton company is entitled to claim the relief which it seeks to claim in this particular case. I do not think it necessary to answer the three questions by three declarations. It can be done by one declaration. In my judgment there should, accordingly, be a declaration that, on the true construction of the Act and the lease, and in the events stated in the special case, the royalties as defined in the Act reserved by and payable under the lease are, as between the Rossington and Denaby companies and the Dalton company, to be deemed to be the net amount arrived at

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after making such deduction therefrom as the Denaby company may be entitled to make under s. 12 of the Act. There will also be an order to tax costs, and a stay of all proceedings.

The Dalton company appealed. The appeal was heard on April 4, 1941.

Macaskie K.C. and *Beney* for the appellants. The decision of Farwell J. that the appellants are not entitled to the relief which they claim is wrong. Against the appellants it is contended that the rent is reduced for all purposes by s. 12, sub-s. 3, of the Doncaster Area Drainage Act, 1929, and that any deduction by the Denaby company from any payment of royalties which it owes under the lease enures for the benefit of the Rossington company. That, however, is not the correct way in which to construe s. 12. The Act does not intend that the right to deduct should enure for the benefit of anyone not fulfilling the description of "mineowner." The Rossington company has ceased to be a mineowner, and is, therefore, not entitled to the benefit of any deduction by the Denaby company. Clause 11 of the lease is not a covenant by the Rossington company to pay rent. It contains an obligation on the Rossington company to observe the covenants falling to be observed by the Dalton company to its head lessor. Clause 11, although it does not use the word "indemnity," is in form an indemnity against all covenants, including that to pay rent. The lease is dated 1911, at which date, it may be assumed, a deduction of this kind would not have been under consideration.

Charles Harman K.C. and *Lindsay M. Jopling* (for *Montgomery White*, on war service) for the Rossington and Denaby companies, were not called on to argue.

SIR WILFRID GREENE M.R. It is with no disrespect to the arguments which have been addressed to us that I content myself with saying that the judgment of Farwell J. commends itself to me alike in its result and in its reasoning. I may perhaps add one observation with regard to the effect of s. 12, sub-s. 3, of the Doncaster Area Drainage Act, 1929. Unless the interpretation placed on it by Farwell J. is right, a very remarkable consequence would follow, namely, that, under the ordinary covenant of indemnity which an assignee enters into, although, when he incurs expenses under the Act, he would be entitled to deduct the appropriate amount from his rent, he would have to carry the whole burden of it by reason of the covenant to indemnify the assignor into which he had entered. The effect of that would be that, in all cases of assignment where the usual indemnity covenant is found, the burden of those expenses would be left on the shoulders of the working lessee, the very thing which the Legislature quite clearly did not intend. I do not think that I need add anything more of my own to Farwell J.'s judgment.

CLAUSON L.J. I agree, and have nothing to add.

GODDARD L.J. I agree.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors: *Johnson, Weatherall, Sturt & Hardy, for Parker, Rhodes, Cockburn & Co., Rotherham; Field, Roscoe & Co., for Davies, Sanders & Co., Nottingham.*

K. R. A. H.

NOTE.

C. A. 1935. Oct. 23, 24.

DENABY AND CADEBY MAIN COLLIERIES, LIMITED *v.* BRODSWORTH MAIN COLLIERY COMPANY, LIMITED.

APPEAL by the defendants, Brodsworth Main Colliery Co., Ld., from a judgment of Branson J.

The facts and evidence sufficiently appear from the following judgments of the Court (Lord Wright M.R., Slesser and Greene L.JJ.) which are copied from the transcript of the shorthand note.

Craig Henderson K.C. and *Beney* for the appellant company.
Macaskie K.C. and *Astell Burt* for the respondent company.

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v,
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LORD WRIGHT M.R. This matter comes before this Court on appeal from the judgment of Branson J. in a proceeding which in form is somewhat peculiar; but the substance of it is quite clear and quite intelligible.

The action was brought by the Denaby and Cadeby Main Collieries, Ld., as plaintiffs, against the Brodsworth Main Colliery Co., Ld., as defendants, to recover a balance of rent or royalties payable by the defendants to the plaintiffs under an indenture of lease dated July 26, 1915, and made between these two parties, being a sub-demise of the Barnsley seam. That is a seam of coal in the Doncaster district of Yorkshire. The defendants had paid the rent due under the sub-lease subject to a deduction of 400*l*. The reason why they claimed to be entitled to make this deduction was because they had been subject to a corresponding deduction at the hands of their sub-lessees, Barber, Walker & Co., Ld., by reason of certain impositions levied upon Barber, Walker & Co., Ld., under the Doncaster Area Drainage Act, 1929.

Under those circumstances, a question arose as to whether the procedure was or was not competent in the form in which it was brought and the matter was dealt with by the Master in Chambers making an order providing for an agreed statement of facts, and providing for the decision of the substantial matter at issue without prejudice to any question which might otherwise arise as to rights of arbitration and procedure under arbitration in order to ascertain the amount, if the question of right or liability was determined. It was only that question which was to be determined in these proceedings on the agreed statement of facts and on the construction of the Act in question and of the covenants in the lease between the plaintiffs and the defendants.

Substantially, the question is, therefore, and it is to that only that I direct this judgment, whether, on the assumption that the defendants had been subject to a particular imposition or levy under the Doncaster Area Drainage Act, 1929, to which I shall refer to as the Act, that imposition can be passed on under the Act by the defendants to the plaintiffs, the method of passing it on taking the form of a deduction from the rent.

The matter came before Branson J., and he said that there were two points for argument and decision, one being whether the defendants were mineowners within the meaning of that Act, and the other being whether, if they were mineowners, a clause in the lease between these two parties excluded the right, which would otherwise arise under the Act, to claim to pass on the imposition.

Branson J. came to the conclusion that under the clause in the lease, even if the defendants were mineowners within the meaning of the Act, their right to pass on the imposition was excluded and on that ground, and on that ground only, he decided against the defendants. It is from that judgment that the appeal is brought.

To anticipate, the conclusion at which I have arrived is that the defendants do not come within the definition of " mineowners " under the Act, but that, if they had come under the definition of mineowners. the terms of clause 25 of the lease would not have excluded that right, The second part is not perhaps material to be decided; but the reason why I come to the conclusion will emerge when I discuss the Act itself, as I must.

The facts are very short and simple. All that I need refer to is this. The plaintiffs, as I have already indicated, were the lessees of a bed or seam of coal known as the Barnsley bed, in the county of Yorkshire, and the defendants are sub-lessees of a part of that bed or seam. The lease from the plaintiffs to the defendants was dated July 26, 1915, and the sub-lease from the defendants to Barber, Walker & Co., Ld. was dated December 31, 1925. The head lessor has changed in identity. The head lessor was originally Dame Georgina Watson Copley, whose right of title eventually became vested in Lord Cromwell and he has disposed of the surface rights to Mr. Thomas Place, who, in turn, has broken up these rights and has granted a number of separate rights in the surface by selling the land above the Barnsley bed to a number of persons, about two hundred in all, and they are the surface owners.

Turning to the lease between the plaintiffs and the defendants, there are a few clauses to which I need refer. Clause 1 of that lease provides: "In consideration of the rents hereby reserved and of the "covenants by the Brodsworth Company and conditions hereinafter "contained the Denaby Company do hereby demise unto the Brodsworth Company all that bed or seam of coal commonly called the "Barnsley bed" and then the position is defined. By clause 2 it provides: "together with liberty for the Brodsworth Company in "upon and over and under the lands to make and have and use such "pits shafts drifts railways tramways cottages coke ovens workshops "buildings heaproom and other works and conveniences as shall be "necessary as well for working and carrying on the demised mine as "for working and carrying on any other coal mines at any time during "the term hereby granted to be worked by the Brodsworth Company "in connection with the demised mine." By clause 5 there is a covenant that "the Brodsworth Company shall not be liable for "damage in respect of anything to be done on or affecting the surface "except as hereinafter provided nor for subsidence." I can then pass to clause 23, where it is provided: "The Brodsworth Company "for themselves and their assigns hereby covenant with the Denaby "Company that the Brodsworth Company will duly pay the rents "hereinbefore reserved: will pay and discharge all rates taxes charges "assessments payments and impositions whatsoever which at any "time during the term shall be charged levied assessed or imposed or "become payable upon or in respect of the mines and premises hereby "demised or the lands occupied or used under the powers hereby "granted except property tax and certain other taxes. By clause 26 "the Brodsworth Company covenant that they will work the demised "mine fairly and properly, according to the most approved method "of working coalmines in the neighbourhood." One other clause I can refer to shortly and that is clause 36. By that clause the defendants covenanted "that they will not during the term assign or underlet or "part with the possession of the demised mine or the term hereby "granted or any part thereof without the previous consent in writing

" of the Denaby Company but such consent shall not be unreasonably " withheld."

Mr. Macaskie, as I indicated, I was going to deal with both points and for this reason. Ordinarily, I should have satisfied myself with dealing with the point that is decisive of the case; but Mr. Craig Henderson has pressed so strongly for some expression of opinion on the correctness, in the view of this Court, of Branson J.'s decision, that I think I ought to say something about that; but, before I deal with that part of the case, I will give you an opportunity, if you desire it, of saying anything that you want to say about Branson J.'s judgment.

Macaskie K.C. May I have a word with my client, my Lord?

LORD WRIGHT M.R. Yes. I am not sure if you do want to say anything about it.

Macaskie K.C. I do not desire to address your Lordships on the covenant point.

LORD WRIGHT M.R. Then I will proceed with my judgment. For the moment it went out of my head, when I said that we did not want to trouble you.

Macaskie K.C. If your Lordship pleases.

LORD WRIGHT M.R. That was the lease between the plaintiffs and the defendants. As I am referring to that lease, it may be convenient now to refer to some of the provisions in the sub-lease between the defendants and Barber, Walker & Co., Ld. That sub-lease dealt with various other plots of land and it dealt with certain plots of land which were leased by the defendants to Barber, Walker & Co., Ld., and some which were leased on the other side by Barber, Walker & Co., Ld., to the defendants. I am only dealing with the latter. Dealing, therefore, with that, we find in clause 9 this provision: " The Brodsworth Company hereby demise unto Barber, Walker & " Company all that mine bed or seam of coal known as the Barnsley " bed of coal situate lying and being under the lands " and then the position is determined, " together with liberty to work get and carry " away the same by means of underground works and roads in " connection with the adjoining and neighbourhood mines of Barber, " Walker & Company but not so as to confer any right of entering " upon the surface of the lands coloured red brown and vermilion on " the plan and together with such rights liberties powers and " immunities for and in favour of Barber, Walker & Company and " their agents contractors servants and workmen as are respectively " granted to the Brodsworth Company by the specified Brodsworth " leases so far as they respectively apply to the Barnsley bed of coal." Then further on in the same clause it provides: " together also with " the benefit of and subject to all clauses, covenants, conditions, " restrictions and reservations respectively contained in the specified " Brodsworth leases so far as they respectively relate to the Barnsley " bed of coal hereby demised to Barber, Walker & Company; to hold " the same unto Barber, Walker & Company from the 1st October, " 1915, for the residues of the respective terms of years granted by

" the specified Brodsworth leases (less the last seven days thereof " respectively)." Then there is a provision for royalties, the amount of which differs from the royalty payable under the other lease. I think there are only one or two other clauses that are material and to those I can refer very shortly. The rent and royalties reserved are to be duly paid clear of all deductions except landlords' property tax and any other tax under any existing or future Acts of Parliament and the covenants in the superior leases are to be performed and observed. Then there is a provision for responsibility for damage resulting from mining operations. In clause 26 there is a provision that there is to be no assignment, underletting or parting " with the possession of the " premises hereby demised or any part thereof " without the previous consent in writing of the lessor, such consent not to be unreasonably withheld. These are the two leases which are material for the purposes of this case.

What happened was that under the Act, the Central Board imposed certain levies upon Barber, Walker & Co. as being the mineowners under the Act and Barber, Walker & Co., as I have said, claim to deduct the amount of that levy from the rent payable to the defendants, who in turn have claimed to make the same deduction from the plaintiffs.

The sole question is whether in principle, apart from any question of figures, that claim to deduct is justified because, as will appear in a moment, if there is a right to deduct, then by statute the contractual rent is treated as being changed and reduced to the extent of that reduction.

I need not refer in detail to the general scope of this Act. Its general scope is to secure the proper drainage of a very swampy area which is liable to be flooded because it is intersected or surrounded by a number of rivers. With that object the scheme under the Act has been brought into being. The business of the Central Board is very roughly to see that the necessary drainage works are done and, in order to secure that result, they have the power to require certain persons to do the necessary work or they have power to do the work themselves and make a levy upon such persons. The question is: What precisely is the definition of those persons, so far as it is necessary to consider that, in order to determine the question arising in this case?

The real question here is whether the defendants can be brought within the definition of " mineowner " in the Act. I will read the definition at once and then I will turn to the relevant sections, which, fortunately, are not numerous. By s. 33 it is provided: " ' Mine- " ' owner ' means the owner, lessee or other persons entitled to work " and get minerals." Another definition may be referred to, namely: " ' Royalty owner ' means a person entitled to receive a royalty." There is a certain reference in other parts of the Act to surface owners, but the position of the surface owners, so far as I know, is not at all relevant to be considered in these proceedings.

The sections to which it is essential to refer are, I think, ss. 9, 10 and 12. As I understand the scheme of the Act, it is that whoever is to be described as a mineowner within the terms of s. 9 is to be primarily liable, either to do the necessary works of construction, or to make the necessary payments to the Central Board, if they have done the work, and, in addition, such a person is bound to establish what is called a maintenance fund ; that is to say, to provide a fund, the income of which can be applied to the maintenance of these particular works when done in the future. Then the mineowner, according to the definition which I have read, is entitled to pass that on in every case which comes within the terms of s. 12. I will not read s. 9 in full, it being rather long ; but the effect of it is this : " It " shall be the duty of every mineowner working or proposing to work " minerals " within the area defined by the Act " to construct and " maintain in proper condition such works and do such things as may, " by reason of any subsidence which results or may result from the " working of the minerals, be requisite, in order to obviate or remedy " . . . . any loss of efficiency which has arisen or may arise in the " drainage system and drainage works of the Doncaster district." By sub-s. 2 it is provided : " It shall be the duty of every such mine- " owner "—that is, the mineowner working or proposing to work minerals under the land—" to comply with such reasonable directions " as may from time to time be given to him by the Central Board with " respect to the construction or maintenance of any drainage works " which he is required under this part of this Act to construct or " maintain." Then there are further ancillary provisions. Sub-s. 3 deals with a power in the Central Board to serve a notice on any delinquent mineowners. Sub-s. 4 is merely a requirement on the mineowner to give information of whatever kind is properly required " with respect to the working or projected working of any such " minerals " and he has to " produce for the inspection of the Board " all plans, sections and levels relating to the working of any such " minerals." In sub-s. 5 there is a power for the Central Board, subject to certain conditions, to do the work themselves and in sub-s. 6 it is provided that, if that course is adopted by the Board, " the " mineowner shall be liable to repay to the Board all reasonable costs " incurred by the Board in carrying out the said works, or such " proportion of those costs as is referable to that part of the works " which was referable to the subsidence or apprehended subsidence." As I understand, that is the sub-section under which this imposition was made. There is one other sub-section to which I should refer, namely, sub-s. 10, which provides : " In the event of any change " taking place in the ownership of a mine all rights and obligations " under this part of this Act which attached to the person who was " the owner of the mine immediately before the change in the owner- " ship shall, by virtue of this Act, be transferred to and become the " rights and obligations of the new owner of the mine." That ownership is to be construed with reference to the definition which I have read. That would include a lessee and would, I think, cover the case where there is a transfer of lease from one person to another, or also, I think, the case where a sub-lease fell in and the rights under a superior lease became vested in the sub-lessor. That would be a change of ownership, if the owner came within that wide definition.

By s. 10, provision is made for the establishment of a fund. That section provides : " Every mineowner who, under the provisions of "the last foregoing section, is liable to construct any drainage works "shall (*a*) establish and maintain such a fund as will in the opinion "of the Central Board be sufficient to produce in perpetuity an income "of such an amount as will be required" for the maintenance "of "the said works after the mine has permanently ceased to be worked." The mineowner is to keep, and on demand produce to the Central Board, proper accounts showing the costs of maintaining the works and he is to provide certain particulars. There are further ancillary provisions which I think are not material, except perhaps sub-s. 3, which provides: "Until the mine permanently ceases to be worked "the mineowner may, from time to time" change the investments. I think that clearly shows that the fund is to be maintained by the person who is working the mine and the obligation is on him.

Sect. 12 is the vital section for the purposes of this case. [His Lordship read sub-ss. 1, 2 and 3, and continued:] Then there is a provision with which I need not trouble, relating to the surface owners. There is then a provision in sub-s. 5 for arbitration. That is the provision which it was agreed should not be affected by the circumstance that these particular proceedings have been brought in the way that they have been brought in the High Court. I ought perhaps to read it. It provides: [His Lordship read it, and continued:]

I think it will be convenient, first of all, to say what I want to say about the relationship of the particular provisions of this section to the covenant in clause 25 of the lease. I have already read that covenant and, in short, the view that I have formed is that the covenant in the lease is entirely irrelevant in considering the application or the incidence of any rights or liabilities under s. 12. When I say "entirely "irrelevant," I must qualify that—a qualification rendered necessary by the terms of clause 2, as to which I shall have to say a word in a moment; but apart from that, clause 12, in so far as it is relevant between these two parties, would create, in my opinion, if the necessary conditions were fulfilled, a new statutory obligation which can only be enforced and must be enforced, if at all, only in accordance with the provisions of the Act.

The general rule, that a statutory right newly created can only receive effect according to the conditions provided in the statute which creates it, has often been laid down. Perhaps I may refer to the well known passage in the judgment of Willes J. in *The Wolverhampton New Waterworks Co.* v. *Hawkesford* (1). Willes J. says: "There are three classes of cases in which a liability may be "established founded upon a statute. One is, where there was a liability "existing at common law, and that liability is affirmed by a statute "which gives a special and peculiar form of remedy different from the "remedy which existed at common law; there, unless the statute "contains words which expressly or by necessary implication exclude "the common law remedy, the party suing has his election to pursue "either that or the statutory remedy. The second class of cases is, "where the statute gives the right to sue merely, but provides no "particular form of remedy: there, the party can only proceed by "action at common law. But there is a third class, namely, where a

(1) (1859) 6 C. B. (N. S.) 336, 356.

"liability not existing at common law is created by a statute which "at the same time gives a special and particular remedy for enforcing "it."

The rights and liabilities under s. 12 fall under that third head and, therefore, the code of procedure which is prescribed by the section applies and that code of procedure shuts out the normal proceedings in which it would have been relevant to consider the terms of clause 25 of the lease. The matter can be put perhaps even more clearly by reference to sub-s. 3, which provides: [His Lordship read it, and continued:] That being so, in my judgment, we have here a new right and a new remedy which lies entirely outside the scope of clause 25 of the lease and, therefore, though otherwise the liability to contribute might be regarded as an imposition on the part of the statutory authority made upon the mineowner, that imposition is not affected in any way by the terms of clause 25.

There is very striking authority in somewhat analogous cases in support of that view and I would refer to two cases out of many. One is *Horner* v. *Franklin* (1), where certain liabilities were imposed upon the owners of factories by the Factory and Workshop Act of 1891. These owners were subject to being required to provide certain conveniences. Escape from fire was the particular matter in question. There was a provision that, if the owner alleged that the occupier ought to bear or contribute to the expenses of complying with the requirement, he could apply to the county court and thereupon that court, after hearing the occupier, could make such an order as appeared to the court just and equitable under all the circumstances of the case. It was held that not only was that liability not affected in any way by a clause in the lease somewhat similar in terms to clause 25 in the present lease, but the only tribunal which had jurisdiction to deal with the matter was the county court and, as Romer L.J. said, ". . . . whenever the owner desires to have contribution or recoup-"ment from the occupier, he must apply to the county court with "its large general jurisdiction, and cannot come to the High Court."

The same principle was applied in the other case, that of *Stuckey* v. *Hooke* (2). The same result was arrived at and I only refer to that case in order to read some very cogent observations of Fletcher Moulton L.J. (2). That appeal dealt not with fire escapes but certain obligations in altering or reconstructing underground bakehouses. The Lord Justice said: "That Act," the Factory and Workshop Act of 1901, "imposed considerable burdens on persons wishing to continue "the use of underground bakehouses, and it would not have been "practicable to lay down in the statute itself rules for the apportion-"ment of these burdens between owners and occupiers. Consequently "the sensible course was taken of making a Court of summary "jurisdiction the statutory tribunal to apportion them, and I think "that the decision of that tribunal was intended to be final. It is "provided that, in arriving at that decision, regard shall be had to "the terms of any existing contract between the parties, as part of "the circumstances of the case, but, as it appears to me, only as "such. I think that the apportionment is to be such as is just and

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(1) [1905] 1 K. B. 479.

(2) [1906] 2 K. B. 20, 25.

" equitable under all the circumstances of the case, of which the " contractual relations between the parties form part only."

I have especially read that, because there are similar words in sub-s. 2. As I have already said, that sub-section provides: [His Lordship read it, and continued :] The learned Lord Justice pointed out in the passage which I have read from the case of *Stuckey* v. *Hooke* (1) that similar words which existed in the Act there being considered, carried with them the necessary consequences, that not only was there to be a statutory tribunal fixed by the Act, but that statutory tribunal was to have regard to other considerations than the terms of any contract between the parties and was to arrive at the apportionment on considerations only one of which was the terms of any contract between the parties. All the relevant considerations were to be taken into account there and the same is true here, where by sub-s. 5 the proper proportion to be deducted from any royalties has to be ascertained in default of agreement, by an arbitrator to be appointed by the Minister, whose decision is to be final.

In my opinion it is perfectly clear, if I may say so with respect to the learned judge, that this statutory procedure for ascertaining the amount of the contribution is completely independent of anything in the contract, except in so far as the terms of the contract between the parties, if any, may be one matter to be taken into account in ascertaining what is the proper allocation of the expense.

I will add one thing more and that is that it would not, in my judgment, be correct to say, as I think was said by the learned judge, that in construing a clause like clause 25, it is enough to be satisfied that the terms used are of the widest possible character, because in this, as in other cases where wide words are used, some regard must be had to the context and the nature of the contract. It is well established that, however wide the words, they must be construed so as to relate only to such matters " which may reasonably be supposed " to have been contemplated by the parties as being within the purview " of such a contract." I have read those words from the leading case of *Foulger* v. *Arding* (2).

In this case the new statutory burden which the Act has created might, I think very fairly and properly, apart from the more conclusive reasons to which I have ventured to refer, be treated as being quite outside the purview of the contract or the contemplation of the parties as covered by the words actually used, however wide they may be.

I now come to the vital question here, namely, whether the defendants can bring themselves within the category of " mineowner." Although I have felt very strongly the force of the arguments urged by Mr. Craig Henderson, arguments which seem to show that on all grounds of reason or fairness there ought to be such a right vested in the defendants as against the plaintiffs, that is to say, a right to insist upon a deduction under s. 12, I have come, however reluctantly, to the conclusion that the language of the Act is too intractable for this purpose to enable me to give effect to Mr. Craig Henderson's contentions. He points out, quite truly, that the expenditure incurred in constructing works for drainage of this character redound, to the benefit of all the

(1) [1906] 2 K. B. 20, 25. (2) [1902] 1 K. B. 700, 706, 707.

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parties and all the different interests which exist in the mines, in the seams and in the land, and that it would be very unfair if the liability being passed on to the defendants by their sub-lessees, Barber, Walker and Co., would not in turn, on similar principles of expediency and justice, be passed on by them to their lessees, the plaintiffs. On a careful examination of the language of the section and of the Act generally, I am entirely unable to interpret the Act in that way. It is perfectly true that a chain of demise and sub-demise is perfectly common in mining rights of this character and it is perfectly true that, if the Legislature has not provided for a case like the present, it must still be regarded as something which ought to be provided for, and be something which can be referred to as a casus omissus; but, if on the language of the Act no other view is possible, except that the defendants are entitled to succeed, because their case is not covered, the gap must be filled by the Legislature and not by the Courts, who have no power to re-write or supplement the terms of the statute.

As I have already pointed out, the question is: Are the defendants mineowners in this relation? Mr. Craig Henderson, turning to the definition which I have already read, has put forward this argument. He said: It is true that the defendants are royalty owners when you look towards their relationship to Barber, Walker & Co.; but then, if you turn round and look towards their relationship to the plaintiffs, they are not royalty owners but they are mineowners and, as mineowners, they have all the rights of mineowners, in particular, the right which they seek now to enforce, of treating the rent reserved and payable under the lease as the net amount arrived at after making the relevant deduction, whatever it may be.

In my judgment, that view cannot be supported upon the terms of the Act. "Mineowner" is defined as "the owner, lessee, or other "persons entitled to work and get minerals." I read the words "entitled to work and get minerals" as qualifying "owner," "lessee," and "or other persons" and I ask myself: Is it possible, in view of the terms of the leases to which I have already referred, to say that the defendants are mineowners in that sense? It seems to me that it is not. They are not entitled to work and get minerals. It is perfectly true that as between themselves and the plaintiffs they had that right under their lease; but they have divested themselves of that right, because they have transferred to Barber, Walker & Co. all the rights of that class which they had and I think it is impossible to say that both Barber, Walker & Co. and the defendants are at one and the same time entitled to work and get the minerals under this Barnsley bed. I think that that view, which is the only view which, in my judgment, is consistent with the terms of the Act, as they appear, is consistent, when one looks back and considers the earlier sections. I have already read s. 9, sub-s. 1, which fixed a duty on "every mineowner working or proposing to work minerals under "any lands situated within the Doncaster district." It is perfectly true that before that duty comes into effect, something more is required than that the person should be a mineowner. He must be a mineowner "working or proposing to work minerals" within the area; but, though that extra condition has to be satisfied, still he must be a mineowner. He must be a person entitled to work the mines and get the minerals. I think that, reading s. 9 carefully and reading s. 10 carefully, it is quite clear that the intention of both those sections is that the right to levy the imposition is limited to one person, namely, the mineowner at the relevant time and at the relevant place.

That being so, it is only a mineowner on whom this levy is made who can possibly have the right of passing on the levy to his immediate lessor and there the chain seems to stop. It is certainly unfortunate that that should be so and I find it very difficult to imagine that the Legislature fully realized that that would be the result of the language which was used in this Act; but, speaking for myself, I am unable to come to any other conclusion than that the defendants here are not mineowners within the meaning of the Act.

My brother Greene L.J. has referred to a statute in which provision was made for the passing down of impositions along a chain. That is the Mining Industry Act of 1926, which contains a schedule which imports the provisions of the Finance Act of 1910, and s. 21, sub-s. 1, is the relevant provision for that purpose. There are no such words in this Act.

In my judgment no other view is possible than that the right to make the levy is limited to a right to make it upon the mineowner, the one person who is entitled at the time and place to work the mine, and the right to pass that on is limited to the royalty owner, the lessor immediately above him, and there the matter stops. If the result which it has been sought to achieve in this case is to be achieved in similar cases, it must be by a change in the Act.

On these grounds, which I confess are not altogether the grounds taken by the learned judge, I think the appeal fails and should be dismissed with costs.

SLESSER L.J. I agree.

In order that the defendants in this action can justify the deduction from rent otherwise due to the plaintiffs, they have, in my opinion, to bring themselves within the ambit of s. 12, sub-s. 1, of the Act. That section, after stating the conditions which are necessary to be satisfied in order that a "mineowner shall be entitled to deduct from "the royalties which any person is entitled to receive in respect of the "minerals, such proportion of the costs so incurred or of the sum so "paid as may be determined to be proper," by sub-s. 3 provides that, where the mineowner is entitled to make a deduction, "the sum "reserved by and payable under the lease shall be deemed to be the "net amount arrived at after making such deduction" and, unless the conditions of that section can be satisfied, it is not possible that the deduction here claimed can be made. The opening words of that section in themselves seem to me to produce insuperable difficulties for the defendants in this case. The section begins thus: "Where "in compliance with the provisions of this Part of this Act any costs "are incurred by a mineowner in constructing or maintaining any "drainage works required" a mineowner is required to pay to the Central Board any sum in respect of costs, he shall be entitled to

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deduct from the royalties as there provided. To my mind it is clear that the only persons here who can be said to have incurred costs "in constructing or maintaining any drainage works required" are the sub-tenants, Barber, Walker & Co. They are the persons, as is not disputed and as is admitted in the statement of facts, who have incurred the expenditure and who under s. 9 have the duty imposed upon them to do the works which have caused that expenditure. So is it also with regard to the obligation to establish a maintenance fund. Those persons who have incurred that expenditure, namely, Barber Walker & Co., are entitled to deduct from the royalties paid to the defendants and have in fact so deducted, and an arbitration may arise in appropriate cases with regard to that matter; but as regards the defendants in this case, who seek to make a similar deduction of the sum which has been deducted from their rentals from the rentals which they pay in their turn under the headlease to the Denaby and Cadeby Main Collieries, they seem to me to be met at the outset by this difficulty which I have indicated, that under s. 12 it is not possible to say that they have incurred any costs in constructing or maintaining drainage works; what they have done is to have suffered a loss by reason of the legal deduction from certain royalties which they otherwise would have obtained in full under their lease. To say that a loss of a royalty which they have suffered under a statute is the same thing or can be brought under the words "any costs incurred by a "mineowner in constructing or maintaining any drainage works" seems to me to be an impossible extension and alteration of the language. If they cannot bring themselves under those words, they do not fall within sub-s. 1 at all.

There is a further difficulty in their way and that is that, apart from those facts, the definition of a mineowner is limited in this way. Sect. 33 provides: [His Lordship read it, and continued:] The definition, if anything, is slightly narrower than that which obtained in Part II. of the Mines (Working Facilities and Support) Act, 1923, an Act dealing with the relation of railways, royalty owners and mineowners where exactly similar words are used in s. 85 D, except that the word "mineowner" is used there to "include the owner, "lessee or other person entitled to work and get minerals" and here is said "to mean" such person; but in any event in my view under the sub-lease all the rights here to work and get minerals have been assigned from the Brodsworth Company, the defendants, to Barber, Walker & Co., by para. 9 of the sub-lease to which we have been referred, under which only seven days of the term remain reserved in the head-lease, so that it could be said properly, I think, that for the last seven days of the lease between the plaintiffs and the defendants their right to work the minerals would revive and, were we considering that last seven days, which we are not, it might be said that at that time, did they come under liabilities contemplated in ss. 9 and 10 of the Act, they would have been mineowners.

Taking the matter as it stands, to my mind it is clear that the only persons now entitled to work and get minerals are Barber, Walker & Co. The Brodsworth Company have demised unto Barber, Walker & Co., liberty to work, get and carry away the minerals by means of underground works. Indeed, Barber, Walker & Co. have taken off from their landlords the covenant to work which existed between the plaintiffs and the defendants, and the sub-lease is made, I suppose, with the assent of the plaintiffs, which is required to be given. Therefore, in my view these defendants are not mineowners.

Mr. Craig Henderson has sought to persuade us that, though vis-a-vis Barber, Walker & Co. they are royalty owners and not mineowners, yet they may be said to be mineowners with respect to their landlords, the plaintiffs, who in their turn would be royalty owners. I think that such a position is quite impossible under this Act. I think that this Act in s. 12, sub-s. 2, contemplates a dichotomy of mineowner on the one side and royalty owner on the other. Speaking for myself, I find it quite impossible to understand how these persons, not being mineowners and not having complied with the conditions of a mineowner under s. 12 and under the definition section, can become mineowners in their turn when it is necessary that they should take advantage of s. 12, sub-s. 1, for the purpose of making a deduction as against the plaintiffs.

That appears to me to conclude this matter, that these defendants do not come within this Act at all, but, in so far as the learned judge has not dealt with this fundamental point, but, assuming that they may be mineowners and assuming that they would have a statutory right to deduction, has come to the conclusion that they are precluded from that right because of clause 25 of their lease with the plaintiffs, which provides that they will pay and discharge all impositions "which at any time during the term shall be charged, levied, assessed, "imposed or become payable" on the lands, and, I suppose, would therefore argue that this was an imposition, that is, the loss of royalty which they would otherwise have had from Messrs. Barber, Walker & Co., which they have agreed themselves to discharge and therefore cannot pass on in their turn, I do not think it is necessary to add to what has already been said by my Lord.

In my view, for the two reasons which he stated, first, that this Act provides a comprehensive remedy and machinery for dealing with the whole subject-matter of the imposition and the deduction, which falls within the third class of case which was stated in the *Wolverhampton* case (1) to which my Lord referred, and, secondly, because I do not think, as I understand the authorities, that such an imposition can have been reasonably within the contemplation of the contractors when they undertook that all impositions might be discharged by the tenant, I agree that the learned judge was wrong in coming to the conclusion that, were these persons mineowners, they would be excluded from their rights by reason of clause 25 of the contract.

I agree that this appeal fails, but fails for reasons other than those stated by the learned judge.

GREENE L.J. I agree.

Were it not for the fact that the view which this Court takes of the case is different from that which was taken by the learned judge who

(1) 6 C. B. (N. S.) 336, 356.

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tried it, I should be content to express my agreement with what has already fallen from my Lords.

The particular mischief which the Act in question is intended to remedy or prevent is the flooding of this particular area through subsidence caused by the working of mines.

In considering an Act of that character, I think it would be reasonable to expect to find that the Legislature had taken steps to apportion the consequential expense fairly and equitably among all persons deriving pecuniary benefit from the operations which lead to the damage which is to be provided for; but the Court is not at liberty, in order to produce what it conceives to be a reasonable result, to put a strained construction on clear language in the Act.

In the present case it appears to me that the language of the Act is too clear to enable the Court to give effect to the argument put forward by Mr. Craig Henderson on behalf of the appellants. The definition of "mineowner" in s. 33 prima facie, in my opinion, extends only to the person "entitled to work and get minerals" in this sense, namely, the person who in truth is entitled to go down the mine and work the minerals. The expression "person entitled to minerals" is to be found in other mining statutes. It is found in s. 3 of the Mines (Working Facilities and Support) Act, 1923, and, again in the Mining Industry Act, 1926, s. 13, sub-s. 2. In both those places the expression has its obvious prima facie meaning of the persons entitled to perform the physical act of working the coal. I can see no reason in the language of this definition clause taken by itself for giving the words any other meaning.

I look, therefore, to the rest of the Act to see whether there are any expressions in it which would justify the Court in attributing to that definition some relative quality such as that for which Mr. Craig Henderson contended. I say "relative" for the reason that the argument involves interpreting the definition as extending to cover the case of a person who is not entitled as against the whole world to work the minerals, but who, as a matter of contract between himself and another, has, relatively to that other, the right to work although he has divested himself of the actual right to work by sub-letting to a third person. Not only do I not find in the rest of the Act anything which would justify me in placing upon the definition the meaning for which Mr. Craig Henderson contends, but I find language which, in my opinion, negatives such a construction. I need not refer to any section other than s. 12. By s. 12, sub-s. 1, the only person who is entitled to deduct is a mineowner who has incurred costs "in "constructing or maintaining any drainage works." It is to be observed that the words "constructing or maintaining" come from s. 9, sub-s. 1, which imposes the liability on a mineowner to construct and maintain works. The language of the sub-section, therefore, when it is describing the person who is entitled to make a deduction, forces me to the conclusion that the person who is contemplated is the person who has had imposed upon him the liability under s. 9, sub-s. 1, to perform the physical acts of constructing and maintaining works, that is, the person actually working or proposing to work the mine.

Mr. Craig Henderson endeavoured to escape from this difficulty by the argument that, where the actual person who has paid the expense of the works deducts a proportion from the royalty which he has to pay to his immediate lessor, the deduction so suffered may properly fall within the words " costs incurred by a mineowner in constructing " or maintaining " works.

This suggestion appears to me to put upon the section a forced construction which its language is incapable of bearing.

For those reasons and for the reasons already given in the judgments which have been delivered, I come, however reluctantly, to the conclusion that the burden cannot be handed on in the way in which the appellants in this case contend that it can.

With regard to the other question in the case, namely, the application of clause 25 of the relevant sub-lease, I agree that the authorities referred to by Mr. Craig Henderson, which were not cited to the learned judge, are sufficient ground for deciding that question in the appellants' favour and, in the circumstances, it is not necessary for me to express any view as to whether, as a pure matter of construction, the charge in this case is or is not a payment or imposition " assessed or imposed " or become payable upon or in respect of the mines " demised within the meaning of clause 25.

Solicitors: *King, Wigg & Brightman, for Parker, Rhodes, Cockburn & Co., Rotherham; Johnson, Weatherall, Sturt & Hardy.*

K. R. A. H.

UTHWATT J.

1941 April 1.

In re BELBRIDGE PROPERTY TRUST, LIMITED.

SWALE ESTATES, LIMITED *v.* BELBRIDGE PROPERTY TRUST, LIMITED.

Emergency legislation — Company — Mortgage — Receiver — Receiver previously appointed by subsequent debenture holders—Application by first mortgagee for account—Date from which account should be rendered—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2, *para.* (*a*) (ii.).

A company held leasehold property subject to a first mortgage and to a subsequent issue of debentures charged on the property. On October 25, 1940, in a debenture-holders' action, a receiver was appointed on behalf of the debenture holders. On December 5, 1940, a summons taken out by the first mortgagees under s. 1, sub-s. 2, para. (*a*) (ii.), of the Courts (Emergency Powers) Act, 1939, for leave to appoint a receiver was served on the company, but it did not come on for hearing until January 21, 1941. On that date leave was given to the first mortgagees to appoint a receiver and a receiver was appointed on January 23, 1941. On January 30, 1941, the first mortgagees took out a summons asking for possession and an account, and a procedure summons was taken out to ascertain the date from which that account should be rendered:—

Held, that the receiver for the debenture holders must account for the rents from December 5, 1940, the date on which the summons under the Courts (Emergency Powers) Act, 1939, was served on the company.

In re Metropolitan Amalgamated Estates, Ld. [1912] 2 Ch. 497, applied.

PROCEDURE SUMMONS.

On October 25, 1940, the holders of 5 per cent. debenture stock in Belbridge Property Trust, Ld., obtained an order of the Court in a debenture holder's action, under which a receiver and manager of the company was appointed. The security of the debenture holders included certain leasehold property subject to a prior mortgage in favour of the first mortgagees, the London Assurance. On November 20, the first mortgagees gave notice to the company of their intention, if they were able, to secure the appointment of their own receiver of the property, and on December 4, 1940, they took out a summons under s. 1, sub-s. 2, para. (*a*) (ii.), of the Courts (Emergency

Powers) Act, 1939, in which they sought the leave of the Court to appoint a receiver. This summons was served on the company on December 5, 1940. As a result of delay between the parties the application did not come on for hearing until January 21, 1941, when an order was made by Farwell J., by which leave was given to the first mortgagees to appoint a receiver. On January 23, the appointment was made, and on January 30 a summons was taken out by which the first mortgagees applied for an order that the receiver for the debenture holders should give up possession of the property and render an account to the first mortgagees of all the income and outgoings in connection with the property from the date of his appointment until possession was given to the first mortgagees and for payment over to the first mortgagees of any balance of income in his hands.

The question before the Court on this procedure summons was whether the receiver for the debenture holders should account for rents as from December 5, 1940, the date on which the summons under the Courts (Emergency Powers) Act, 1939, was issued, or as from January 30, 1941, the date of the issue of the present summons.

T. D. D. Divine, for the first mortgagees. The date from which the receiver for the debenture holders must account is December 5, 1940. In *In re Metropolitan Amalgamated Estates, Ld.* (1), the principle is laid down for the ordinary case which arises when no Courts (Emergency Powers) Act is in operation. It is that a first mortgagee who wishes to displace the receiver for the second mortgagee must take a definite step to oust that receiver by making an application to the Court, and that, although there is delay, the date from which he is entitled to rents is that on which he takes that step. The Courts (Emergency Powers) Act, 1939, however, introduces a new factor which results in the adoption of an earlier date. Where the first mortgagee must obtain leave to appoint the receiver under the Courts (Emergency Powers) Act, 1939, the date of the service of the summons asking for that leave

(1) [1912] 2 Ch. 497, 501.

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is the date from which the first mortgagees' receiver, when appointed, has the right to rent.

Gedge, for the debenture holders. The date from which the receiver for the debenture holders must account is January 30, 1941, the date of the summons by the first mortgagees asking for the account and possession.

G. D. Johnston, for the trustees for the debenture holders. The trustees support the contention of the debenture holders. The principle is that an order enabling a mortgagee to enforce his security dates back to the date on which he applied for leave to enforce that security and no earlier date.

UTHWATT J. [His Lordship stated the facts and continued :] The question which I have to determine is whether the debenture holders' receiver should account for rents as from December 5, 1940, that being the date on which the first mortgagees' summons under the Courts (Emergency Powers) Act, 1939, was served, or as from January 30, 1941, the date of the issue of the present summons. The point is a short one and though it has not been the subject of any judicial decision the answer is, I think, clear. It appears to me that the principle established by *In re Metropolitan Amalgamated Estates, Ld.* (1), is that a first mortgagee desiring to obtain possession of the property in the hands of a receiver for a second mortgagee is in no way to be prejudiced by any necessary procedural delay that occurs in the Court in the course of his obtaining the authority of the Court to make effective the rights claimed by him. The rule in that case was stated to be that the first mortgagee was to be entitled to an account as from the date when he served his application for possession, but that rule is based on a wider principle to which, in cases where proceedings under the Courts (Emergency Powers) Act, 1939, are necessary, effect must be given by treating the whole of the proceedings by which the mortgagee obtains the leave of the Court under that Act as merely part of the machinery by which the mortgagee applies to the Court for possession. It follows that the rents must be accounted for from the

(1) [1912] 2 Ch. 497.

date when the summons under the Courts (Emergency Powers) Act was served, that is December 5, 1940.

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Solicitors: *Lawrance, Messer & Co.; Ashurst, Morris, Crisp & Co.; Linklaters & Paines.*

J. L. D.

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April 23 ; May 2.

In re WARD. PUBLIC TRUSTEE *v.* WARD.

Charity—Charitable bequest—Will—Gift for " educational or charitable " or religious purposes "—Validity.

A testator bequeathed the residue of his estate to the Archbishop of Westminster on trust that he should forthwith " in his absolute " discretion devote the same to the furtherance of educational or " charitable or religious purposes for Roman Catholics in the " British Empire in such manner in all respects as he may think " fit " :—

Held, that the gift, although it contained superfluous words, was not thereby vitiated, but was confined within the strict legal limits of a charitable gift and was valid.

Decision of Farwell J. reversed.

APPEAL from Farwell J.

The testator, Charles Ward, who died on May 27, 1940, by his will, dated November 17, 1939, bequeathed to the Public Trustee as trustee thereof the residue of his estate upon trust for sale and conversion, directing him " to pay my funeral "and testamentary expenses and debts and the legacies hereinbefore bequeathed " and to " stand possessed of the residue "of the said moneys in trust to pay and transfer the same to "the Archbishop of Westminster or other the head of the "Roman Catholic Church in England for the time being upon "trust that he shall forthwith in his absolute discretion devote "the same to the furtherance of educational or charitable or "religious purposes for Roman Catholics in the British Empire "in such manner in all respects as he may think fit."

The Public Trustee on November 6, 1940, took out a summons to determine (inter alia) whether the residuary gift was a valid charitable bequest or whether there was an intestacy as regarded the residuary estate.

Farwell J. held that the question was whether the words in the will could be so read as to confine the purposes to which the money could be applied to what was strictly charitable. The furtherance of educational purposes was properly charitable, but religious purposes were wide enough to embrace purposes which were not charitable within the meaning of the word. Taking the words "educational or charitable or religious purposes" disjunctively and contrasted with one another, the only possible conclusion was that the testator deliberately intended to embrace within the purposes for which the money might be used some which were not, within the legal definition, charitable. The residuary gift, therefore, failed for uncertainty.

The Archbishop appealed. The appeal was heard on April 23, 1941.

Charles Harman K.C. and *Myles* for the appellant. The gift is valid as a charitable gift. Where the words indicate it, the word "charity" in this connection can be interpreted in a popular and not a technical sense. That solves all the problems raised by the present will. A trust for religious purposes is a trust for charitable purposes, unless the contrary is shown. [They referred to *In re White* (1); and *Dunne* v. *Byrne* (2).] The collocation of words in the present will does not vitiate their effectiveness. Each word separately would constitute a good charitable gift. [They referred to *In re Davidson* (3).]

Danckwerts, for the Attorney-General, adopted the argument of the appellant.

H. Rose for the testator's brother. The decision of Farwell J. was right. It has been conceded on behalf of the appellant that the words of the will are disjunctive. For the gift to be valid as a charitable bequest the trustee must be bound to apply the whole sum to charity. If there is any non-charitable purpose to which any part of the fund can be applied the trust fails. The word "charitable" in the present case cannot throw a mantle of protection over the two other epithets. The gift fails unless every religious purpose and every educational purpose is also a charitable purpose. Religious purposes are not necessarily charitable: see interlocutory observations of Lord Lindley in *In re White* (4) where he draws attention to the view that religious services can only be said to be charitable if they tend directly or indirectly towards the instruction or edification of the public. It would be possible for the Archbishop to apply part of the fund to a

(1) [1893] 2 Ch. 41.
(2) [1912] A. C. 407.
(3) [1909] 1 Ch. 567.
(4) [1893] 2 Ch. 41, 48.

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purpose which was either educational or religious but not charitable in the strict sense. [He referred to *In re Bain* (1) and *In re Diplock* (2).]

Pennycuick for other next-of-kin of the testator.

Vanneck for the Public Trustee.

Cur. adv. vult.

1941. May 2. The following judgments were read. MACKINNON L.J. [after stating the facts:] Thanks to the industry of counsel I have made my first acquaintance with a number of authorities in most of which the manifest intentions of various testators seem to me to have been defeated by their artless use of language. Of the authorities so cited only one seems to me to be of any value, because it is the only one which laid down a principle which I can follow. That is the passage in the speech of Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel* (3), which was cited by Farwell J. Lord Macnaghten there said: "Charity in its legal sense "comprises four principal divisions: trusts for the relief of "poverty; trusts for the advancement of education; trusts "for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of "the preceding heads." The words in this will are: "devote ". . . . to the furtherance of educational or charitable or "religious purposes." Using such knowledge of the English language as I possess, I think that these words have precisely the same meaning as the first three of the categories in Lord Macnaghten's definition. The only difference seems to be (*a*) the use of the word "furtherance" instead of the word "advancement," and (*b*) while Lord Macnaghten's order of his categories is "relief of poverty," "education," and "religion," the testator's order is "education," "charity" and "religion." To my mind this makes no difference, and I think that the testator's words exactly fulfil Lord Macnaghten's definition of a charitable trust. Put in another way, if the testator's words were, "devote . . . . to the furtherance of "charitable, or educational, or religious purposes," the identity with Lord Macnaghten's definition would be complete, save for the immaterial substitution of "furtherance" in place of "advancement." Equally would the gift appear to be, under that definition, a good charitable gift if the words were "devote . . . . to the furtherance of educational or religious or "charitable purposes." If these simple words, arranged in either of these collocations, would create a good charitable gift, I am unable to understand why they fail to do so when the three disjoined purposes happen to be arranged in the order "educational or charitable or religious "purposes."

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(1) [1930] 1 Ch. 224.
(2) Ante p. 253.
(3) [1891] A. C. 531, 583.

In the result, I think the answer to the question propounded ought to be that the residuary gift to the Archbishop is a valid charitable bequest, and this appeal ought accordingly to be allowed.

CLAUSON L.J. I agree that the disposition of the residuary estate is valid, and that the appeal against the order of Farwell J. must be allowed.

The view of Farwell J. that the gift is uncertain in that no one can enforce it depends on the proposition that, according to the true meaning of the will, the Archbishop is empowered to apply the fund bequeathed to him, not only for educational and charitable purposes, but also (under the words "for "religious purposes") for purposes which do not fall within the ambit of charitable purposes as that phrase is used in this Court. In my judgment, that is not the true effect of the phrase "religious purposes" as used in this will. It must be taken to be settled law, at all events in this Court, since *In re White* (1), that, in the absence of a context enabling the Court to place some more extended meaning on the words "religious purposes," the phrase must be taken to mean "purposes conducive to the advancement of religion," and, accordingly, purposes which, as stated by Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel* (2), the law

(1) [1893] 2 Ch. 41.

(2) [1891] A. C. 531.

recognizes as charitable. No doubt, with a proper context, it might be found that a testator used the phrase in a special wider sense so as to cover a purpose which, though connected with religion or based on religious convictions, is not conducive to the advancement of religion. In *Cocks* v. *Manners* (1) it was held that the purpose of self sanctification by the observance of various religious practices and rules, though, no doubt, connected with religious conviction, was not a purpose conducive to the advancement of religion. Farwell J. appears to find an indication of the use of the phrase "religious "purposes" in that extended sense in the words "for Roman "Catholics in the British Empire." I fear that I cannot agree that those words supply the necessary context. They seem to me to indicate merely that the beneficiaries of the particular charitable purposes (which include educational and religious and other charitable purposes) for the advancement of which the fund is to be applicable are to be members of the Roman Catholic community. Farwell J. further finds support for his view in the collocation of the phrase "religious purposes" with the phrase "charitable purposes." It is true that the phrase "religious purposes" points to a type of purpose which is comprised in the phrase "charitable purposes" as construed in this Court, and, accordingly, it is true to say that the words "religious purposes" are superfluous in that, if they were omitted, the fund would (by reason of the word "charitable") be nevertheless available for religious purposes. But superfluous words are not uncommon in wills, and the mere fact that the words are superfluous seems to me to be quite insufficient to justify the Court in putting an extended meaning on words which have, as the authorities stand, a well defined meaning.

I thus fail to find any satisfactory ground on which I am able to hold that the will authorizes the application of the fund to a purpose which, though connected with religion, is not conducive to the advancement of religion. The gift is, accordingly, in my view, one which is confined within the strict limits of a charitable gift, in the sense in which that term is used in these Courts. Should any attempt be made, in administering the gift, to exceed those limits, the Attorney-General will be entitled to interfere. Accordingly, the gift must, in my judgment, be held to be valid.

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(1) (1871) L. R. 12 Eq. 574.

LUXMOORE L.J. [after stating the facts:] It is well settled that "charity" in the legal sense has a far wider meaning than the word conveys in its popular use. It is usual to refer to the preamble to the statute 43 Eliz. c. 4, as defining the legal meaning of the word, but the word is by no means limited to the exact charities there referred to. Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel* (1) said that charity in its legal sense comprised four principal divisions, namely, trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads. Since the decision in *Income Tax Commissioners* v. *Pemsel* (1) the division made by Lord Macnaghten has been universally used in the text books to classify charities in the legal sense. Thus, in Halsbury's Laws of England, 2nd ed., vol. iv., p. 103, tit. "Charities," charitable purposes, which are dealt with in s. 2 of Part I. of the title, are subdivided under the headings: (1.) Relief of the aged, impotent and poor; (2.) Educational purposes; (3.) Religious purposes; and (4.) Public purposes. Further, it has been frequently stated both in text books and in reported cases that gifts for religious purposes are prima facie valid charitable gifts. It is stated in Tudor's Charities, 5th ed., p. 31, that "the proposition that "'religious purposes' are objects of charity would seem "established by authority," and at p. 66, note 5, that "In "England and Ireland religious purposes are prima facie "charitable," while in *Dunne* v. *Byrne* (2) Lord Macnaghten said, "The Court has held over and over again that a gift "for religious purposes is a good charitable gift. That is "true." Lord Atkin in *Farley* v. *Westminster Bank* (3) said:

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(1) [1891] A. C. 531, 583.
(2) [1912] A. C. 407, 411.
(3) [1939] A. C. 430, 435.

"'Parish work' seems to me to be of such vague import as "to go far beyond the ordinary meaning of charity, in this "case in the sense of being a religious purpose."

It is true that in a number of cases it has been said that the words "religious purposes" are wide enough to embrace purposes which are not charitable within the legal meaning of the word. It is perhaps sufficient to refer to the statement made by Wickens V.-C. in *Cocks* v. *Manners* (1) where he said: "It is said, in some of the cases, that religious purposes are "charitable, but that can only be true as to religious services "tending directly or indirectly towards the instruction or the "edification of the public; an annuity to an individual, so "long as he spent his time in retirement and constant devotion, "would not be charitable, nor would a gift to ten persons, "so long as they lived together in retirement and performed "acts of devotion, be charitable." It is, however, to be observed that in *Cocks* v. *Manners* (1) the Court had not to consider what meaning should be attached to the words "religious purposes," for those words did not appear in the will under consideration. The material words were to be found in the gift to "the following religious institutions "namely . . . . the Dominican convent at Carisbrook and the "Sisters of Charity of St. Paul at Selley Oak." The validity of each of these gifts was tested by the objects for which the respective institutions were established, and in the result the bequest to the Dominican convent was held not to be charitable in the legal sense of the term, while that to the Sisters of Charity of St. Paul at Selley Oak was held to be charitable.

In the majority of cases dealing with the question whether a gift for religious purposes constitutes a charitable gift the actual words "religious purposes" are not present in the document under consideration. Indeed, so far as my own researches have proceeded, it seems that the words "religious "purposes" occur in but a small number of the reported cases. In *Baker* v. *Sutton* (2) the material words of the residuary gift were "for such religious and charitable institutions and "purposes" as the major part of the trustees should think proper. The gift was held to be a good charitable gift. In that case reference was made both in the argument and judgment to *Williams* v. *Kershaw* (1), where the gift was for such benevolent, religious and charitable purposes as the trustees should think most beneficial. Lord Cottenham said: "Did he" [the testator] "mean that there should be no "application of any part of the residuary fund to any but "religious purposes? Such does not appear to me to be his "intention; he intended to restrain the discretion of his "trustees, only within the limits of what was benevolent, or "charitable, or religious." There is also what purports to be an extract from Lord Cottenham's speech in *Williams* v. *Kershaw* (1) in a note in *Baker* v. *Sutton* (2), where the following sentence is quoted: "The option in the present case makes "the gift bad, not because illegal, but because it introduces "a generality which deprives it of the character of a charity "legacy, and makes it impossible for this Court to execute it." From those extracts it is plain that, had the option been confined to religious purposes, Lord Cottenham would have held the gift valid. In *Wilkinson* v. *Lindgren* (3), the testatrix, after giving legacies to several charitable institutions, gave her residuary personal estate to and among the different institutions "or to any other religious institution or purposes "as her trustees might think proper." Lord Hatherley affirming the decision of Lord Romilly M.R., held the gift to be a good charitable gift.

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(1) L. R. 12 Eq. 574, 585.

(2) (1836) 1 Keen 224, 232.

I have been unable to find any English case in which the words to be considered were "charitable or religious purposes," but those words were held in *In re Salter* (4) to constitute a valid charitable gift. There are, however, many reported cases where the Court, in adjudicating on the validity of particular bequests, has held them to be valid because the words under consideration were construed as being equivalent to bequests for religious purposes. It is sufficient to refer to two of these cases. The first is *In re White* (5). There the

(1) (1835) 5 Cl. & F. 111, 113.
(2) (1836) 1 Keen 224, 232.
(3) (1870) L. R. 5 Ch. 570.
(4) [1911] 1 I. R. 289.
(5) [1893] 2 Ch. 41, 52.

gift to be considered was in these terms: "I do give and "bequeath the whole of my property to the following religious "societies, viz. . . . ." There is then a blank in the will followed by the words "to be divided in equal shares among them." The will was written on one side of several sheets of notepaper fastened together bookwise. On the back or blank sheet opposite the sheet on which the clause quoted was written were the following words written by the testator after the execution of the will. "viz. the Tract Society, the Home "Missionary Society, the London Missionary Society, the "Colonial Missionary Society." These words were not admitted to probate and were consequently ignored. Lindley L.J. said in his judgment: "It is, however, impossible, we think, "seriously to deny that the testator intended his property "to be given to some religious societies for religious purposes. "His property was to be divided amongst certain societies: "but what for? The only rational answer to this question "must, we think, be 'for the purposes of those societies'; "and, the societies being themselves described as 'religious "'societies,' the purpose for which the testator gave his "property must be treated as religious purposes. It is true "that these are not necessarily 'charitable' purposes, and in "a particular case a 'religious' society may be shown not to "be a 'charitable' society. This was the case in *Cocks* v. "*Manners* (1). But the authorities show that a bequest to "a religious institution, or for a religious purpose, is prima "facie a bequest for a 'charitable' purpose, and that the "law applicable to 'charitable' bequests, as distinguished "from the law applicable to ordinary bequests, ought to be "applied to a bequest to a religious institution or for a religious "purpose." Then he refers to *Baker* v. *Sutton* (2), *Townsend* v. *Carus* (3) and *Wilkinson* v. *Lindgren* (4) and continues: "We can find no authority which really conflicts with these, "or which is opposed to the principle on which they proceed; "and we cannot, without splitting straws, distinguish this "case from them. We come, therefore, to the conclusion—

(1) L. R. 12 Eq. 574.

(2) 1 Keen 224.

(3) (1843) 3 Hare 257.

(4) L. R. 5 Ch. 570.

"first, that the gift is for religious purposes; and, secondly, "that, being for religious purposes, it must be treated as a "gift for 'charitable' purposes, unless the contrary can be "shown." In the second case, *Dunne* v. *Byrne* (1), the words of the gift were: "I will and bequeath that the residue of my "estate should be handed to the Roman Catholic Archbishop "of Brisbane and his successors to be used and expended "wholly or in part as such Archbishop may judge most con-"ducive to the good of religion in the diocese." Lord Macnaghten, in dealing with the argument in support of the validity of the gift, made the statement to which I have already referred in the earlier part of this judgment and went on to say: "But the answer is: this is not in terms a "gift for religious purposes, nor are the words synonymous "with that expression"; and referring to *In re White* (2), he said: "All they" [the Court of Appeal] "did, was to hold, "as had often been held before, that a bequest for religious "purposes was a good charitable gift."

In view of these authorities I am satisfied that this Court is bound to hold that a gift for "religious purposes," if in those words and there is no context compelling another view, is a good charitable gift.

Is there any context in the will before the Court in the present case which compels the Court to hold that the words "religious purposes" are used in some restricted sense? The only context from which any argument to support this view can possibly be drawn must be found in the use of the word "charitable" and the disjunctive "or" in the phrase in which the words "religious purposes" appear. Farwell J. accepted the argument that, because the word "charitable" by itself includes religious purposes, and the words "or "religious purposes" follow after the word "charitable," the latter words would be redundant unless they were construed as embracing only such religious purposes as are not within the strict legal sense charitable. It is to be observed that the main part of this argument applies with equal force to the meaning to be attributed to the word "educational" which is to be found in the earlier part of the gift, but Farwell J. held that "educational" must be given its ordinary meaning. I can see no sufficient reason for adopting the restricted construction. It is plain that both "educational purposes" and "religious purposes" are prima facie apt words for constituting valid charitable gifts. There are, however, many other objects which are strictly within the legal definition of "charity," and it seems to me that the word "charitable" may well have been used to make it clear that those other objects were also to be included. In my judgment, the testator's use of the adjective "charitable" in addition to the adjectives "educational" and "religious" for defining his purposes cannot properly be relied on as showing that he intended to use the last two adjectives or either of them in some sense other than that primarily to be attributed to them or it. There is no canon of construction which denies to a testator the privilege of indulging, to some extent, in tautology.

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(1) [1912] A. C. 407, 411.

(2) [1893] 2 Ch. 41.

For these reasons, I think that the appeal should be allowed and the declarations sought by the notice of appeal made.

Appeal allowed.

Solicitors: *Witham & Co.; Walter Crimp & Co., for Harold Michelmore & Co., Newton Abbot; Treasury Solicitor.*

J. L. D.

In re DESTONE FABRICS, LIMITED.

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SIMONDS J.
Mar. 24, 26.
C. A.
May. 22, 23.

Company—Winding up—Floating charge created within six months—Validity—Payment of cash into company's banking account—Object to benefit creditors and not company—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 266.

By s. 266 of the Companies Act, 1929: "Where a company is "being wound up, a floating charge on the undertaking or property "of the company created within six months of the commencement "of the winding up shall, unless it is proved that the company "immediately after the creation of the charge was solvent, be "invalid, except to the amount of any cash paid to the company "at the time of or subsequently to the creation of, and in "consideration for, the charge, together with interest on that "amount at the rate of five per cent. per annum."

A debenture was issued to Z as a floating charge on the assets and undertaking of a company, which was then insolvent, to secure the principal sum of 900*l.* paid a few days later by Z into the company's banking account in cash provided by D, for whom Z was nominee and trustee of the debenture. On the same date as that on which the money was paid into the company's banking account there was paid out of that account 350*l.* to A and 350*l.* to B in respect of directors' fees due to them, and 200*l.* to D, representing an amount guaranteed by him in respect of the company's overdraft. Within six months of the date of the issue of the debenture an order was made for the compulsory winding up of the company:—

Held, that the object and effect of the transaction was not to benefit the company, but merely to provide money for the benefit of certain creditors of the company to the prejudice of other creditors; that there was no cash bona fide "paid to the company "at the time of or subsequently to the creation of, and in "consideration for, the charge" within the exception in s. 266; and that, therefore, the charge was invalid.

In re Matthew Ellis Ld. [1933] Ch. 458 applied.

SUMMONS IN WINDING-UP.

Destone Fabrics, Ld., was incorporated on August 3, 1939, with a capital of 500*l.*, divided into 500 shares of 1*l.* each. The directors of the company were, at all times, Mrs. Dorothy Stone and Edward Braunstein. On April 1, 1940, a debenture was issued by the company to the respondent, Jack Zimmerman, to secure the principal sum of 900*l.*, constituting a floating charge on the assets and undertaking of the company. At that date the company was insolvent and owed, among other debts, 350*l.* each to Mrs. Stone and Edward Braunstein

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in respect of directors' remuneration, and 200*l.* to Reginald Maurice Davis, as a contingent creditor, under a guarantee by which he had guaranteed an overdraft of the company at the company's bank up to that sum. On April 12, 1940, 900*l.* in cash, which purported to be by way of subscription for the debenture and had been provided by Davis, was paid into the company's banking account. On the same date there was paid out of the banking account 350*l.* to Mrs. Stone, 350*l.* to Braunstein and 200*l.* to Davis. On May 3, 1940, a petition was presented for the winding up of the company and on May 27, 1940, the company was ordered by the Court to be wound up. On August 15, 1940, a summons was taken out by the liquidator asking for a declaration that the floating charge expressed to be created by the debenture issued on April 1, 1940, was invalid.

Wynn Parry K.C. and *T. D. D. Divine* for the liquidator. The inference from the facts is that this sum of 900*l.* was paid into the bank to enable the three specified payments out to be made. It was not a bona fide transaction and it is impossible to say that the company secured any advantage from it. The money was paid to enable certain creditors to be paid and to leave the person who provided the money with a charge which would render other creditors unable to share in the assets.

Spens K.C. and *Pennycuick* for the respondent. The 900*l.* was bona fide advanced to the company by the respondent, it having been supplied to him by Davis, a creditor of the company, and a debenture is the proper security for the loan. There can be no question but that 900*l.* found its way to the credit of the company and enabled it to discharge certain of its debts and prima facie that must be a payment in cash which was of benefit to the company. The charge created in connection with the transaction is a good one. They referred to *In re Matthew Ellis, Ld.* (1).

Wynn Parry K.C. replied.

Cur. adv. vult.

(1) [1923] Ch. 458.

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1941. Mar. 26. SIMONDS J. [after stating the facts:] The question for the determination of the Court is whether to any and to what extent cash was paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge made on the company's assets on April 1, 1940, so as to bring the transaction within the exception in s. 266 of the Companies Act, 1929. It is clear that, in form at least, if not in substance, cash was paid to the company. I am satisfied by the evidence that on April 12 900*l.* was paid into the company's banking account, and I am equally satisfied that, on that date, 900*l.* at least was paid out of that banking account—as to 350*l.* to Braunstein, as to 350*l.* to Mrs. Stone, and as to 200*l.* to Davis. The question is whether, in those circumstances, I am to treat the payment as a payment of cash to the company not only in form, but also in substance.

The first question which has to be considered is this. The debenture was issued to one Zimmerman. It is not denied that the money which Zimmerman paid to the bank had been provided immediately before that payment by Davis, but it is urged, nevertheless, that Zimmerman was the real principal and was desirous of making an investment by way of lending money to this company on the security of this debenture, he having procured Davis to lend the money to him that he might be in a position to make the investment. I have had the advantage of hearing the evidence of Zimmerman. I have not had the advantage of hearing the evidence of Davis, although I was told that he was in Court during the hearing. With that advantage and disadvantage, I remain wholly unconvinced of the truth of this highly improbable story. I find as a fact that the money advanced to the company, which was paid into the company's account and afterwards paid out of it, was provided by Davis as principal, and that, throughout the transaction, Zimmerman was merely the agent or nominee and, in the events which happened, the trustee of the debenture for Davis. I must therefore regard this money as paid to the company by Davis, and it is in the light of that fact that I must examine the transaction.

It is obvious from what I have said that, so far as Davis himself was concerned, the transaction was one by which, instead of being an unsecured contingent creditor in the sum of 200*l.*, he became a secured creditor in the sum of 900*l.*, having had the 200*l.* paid off by the company. It is also quite clear, I think, that, so far as he was concerned, the transaction was a mere subterfuge, and, to use the words of an authority to which I shall refer, that the company was a mere conduit pipe through which a sum was paid, part of which was paid out afterwards to him.

What are the facts? I have the minutes of the board meeting of April 1, 1940, the date on which the debenture was issued, although in fact the money was not paid into the bank until April 12. It was reported to the meeting that Zimmerman had offered to lend the company 900*l.* on the security of a debenture to carry interest at 5 per cent. per annum, and it was resolved that that offer be accepted. The company's solicitor was instructed to prepare the debenture and the debenture was produced and sealed in the presence of two directors and the secretary. It is to be remembered that, at this time, the company was hopelessly insolvent and the directors must have been well aware of that fact. They must have been aware, further, that the company could not be put on its legs merely by the provision of 900*l.* whereby to pay off certain of its creditors. It could only be put on its legs by a substantial sum of working capital being obtained and from nothing short of this could it derive any advantage. It follows that the purpose of this debenture was nothing more than a contrivance by which the debenture holder himself or the person for whom he was trustee and the directors might have a sum of money provided which would not in any way benefit the company, but which would largely benefit them, placing them in a better position than the other unsecured creditors of the company.

It is in the light of those facts that I have to consider whether this was in substance and not merely in form cash paid to the company. In *In re Matthew Ellis, Ld.* (1), the question what is cash paid to the company within the meaning of s. 265 was considered at some length by the Court of Appeal, and the result emerges that it is a matter for the consideration of all the circumstances of the case, with the warning that it is not fatal to the validity of the debenture that the money in respect of which it is issued is provided on a condition that it should be devoted to the payment off of certain debts. That is not, by itself, a fact fatal to the validity of the debenture, but I cannot help thinking that, in considering all the circumstances, it is a fact to which consideration has to be given. I am assisted by the observations of Romer L.J. in *In re Matthew Ellis, Ld.* (1), where he says (2): "There are, of course, certain "considerations for the issue of a debenture which plainly do "not amount to payments in cash. Where, for instance, an "existing creditor of a company takes a debenture from the "company to secure the amount of his debt on the terms that "he shall not immediately press for payment of his debt, or "where he takes a debenture for the amount of his debt on "the terms that the debt itself is to be extinguished, obviously "no cash passes from the debenture holder to the company. "If in such a case he goes through the form of drawing a "cheque in favour of the company for the amount of his debt "on the terms that the company shall forthwith itself hand "to him in exchange a cheque for the same amount, there has "in form been a payment in cash. But in such a case there "has not been a payment in cash if one looks at the substance "and not at the form, and in considering whether there has "been a payment of cash within the meaning of s. 266 it is "always the question of substance that must be regarded and "not the question of form." He then deals with *In re Orleans Motor Co., Ld.* (3) in which Parker J. had to consider the question, and he says this: "Parker J. had a case to decide "under the section (or rather the section of the earlier Act, "which corresponds to s. 266 of the present Act) in *In re* "*Orleans Motor Co.* (3). In that case directors of a company "who had guaranteed the company's overdraft were being "pressed by the bank, as indeed was the company, for

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(1) [1933] Ch. 458.

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(1) [1933] Ch. 458.
(2) Ibid. 477.
(3) [1911] 2 Ch. 41.

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"repayment of the overdraft. 1500*l.* was the amount "that the bank required to be paid. The company was "liable for it as principal debtor and the directors were "liable for it as guarantors. The company being unable to "pay, the obvious thing would have been for the guarantors "to pay the 1500*l.*, in which case they would have been "unsecured creditors of the company for that amount. "Instead of that, they went through the form of handing three "cheques for 500*l.* to the company on the terms that the "company should hand those cheques over to the bank and "issue debentures for the amount to them, and they then said "that they had paid cash to the company. Parker J. was not "misled by such a transparent subterfuge, and held that there "had not in fact been any cash paid. The directors had not "parted with any cash to the company and never intended "to part with any cash to it. The company never received "any cash from the directors and never contemplated receiving "any cash from them. All that had happened was that "the directors had, using the company as a conduit pipe, "paid 1500*l.* cash to the bank. Of course, that debenture "was invalidated by the section."

The facts of each case differ from each other, and those in *In re Orleans Motor Co.* (1), as explained by Romer L.J., differ in some respects from the facts of the present matter, but I think that I too am entitled to say that in this case the Court will not be misled by a transparent subterfuge. I find it impossible to believe that the purpose of this transaction was anything else but, by the issue of this security, to procure the payment to certain directors of the sums due to them in preference to other creditors of the company, and payment also to Davis who was himself advancing the money on the security of the debenture.

The ultimate test in such cases may well be whether the transaction is to be regarded as one intended bona fide for the benefit of the company, or whether it is intended merely to provide certain moneys for the benefit of certain creditors of the company to the prejudice of other creditors of the company.

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(1) [1911] 2 Ch. 41.

There must, in such cases, and I have no doubt that this is one of them, be a question of fraudulent preference also arising. With that aspect of the case I am not immediately concerned, but I am satisfied that this transaction was one in which the advantage of the company was not the object of its contrivers, but the benefit to themselves, using merely the company's banking account as a means by which their ends could be obtained. In those circumstances I must hold that the floating charge created by the debenture is wholly invalid. The respondent must deliver up to the applicant possession of, or account to him for, the property purported to be comprised in that floating charge which came into his hands through the receiver appointed under the debenture. The respondent must pay the costs of this application.

J. L. D.

The respondent appealed. The appeal was heard on May 22, 23, 1941.

Denning K.C. and *Pennycuick*, for the appellant, repeated substantially the arguments used in the Court below.

Wynn Parry K.C. and *T. D. D. Divine*, for the respondent, were not called on.

The Court of Appeal (SCOTT, CLAUSON and LUXMOORE L.JJ.), without delivering a judgment, affirmed the decision of Simonds J.

Appeal dismissed.

Solicitors for the appellants: *H. Fishman & Co.*
Solicitors for the respondent: *T. J. Robinson & Son.*

P. J. B.

FARWELL J.

1941
May 2.

In re FRAZER. FRAZER *v.* HUGHES.

Will—Construction—Bequest "free of all taxes (including income tax) " and duties"—Inclusion of tax payable under colonial law.

A testator by his will directed his trustees out of the income of his residuary trust fund to pay to his widow such a sum as would, together with the income received by her under his marriage settlement, produce an annual income for her of 2000*l*. "free of " all taxes (including income tax) and duties."

After his death the widow remarried and went to live in Kenya Colony. A summons was taken out by the trustee of the will to ascertain whether the annual income to which the income of the widow was to be made up out of the testator's residuary estate was to be calculated free of income tax payable by her under the law of Kenya Colony :—

Held, that the income tax payable under the law of Kenya Colony was not a deduction contemplated by the testator and that it must be borne by the widow and not by the testator's residuary estate.

In re Norbury [1939] Ch. 528, applied.

ADJOURNED SUMMONS.

The testator, John Gordon Frazer, who died on August 1, 1916, by his will, dated September 11, 1915, directed his trustees out of the income of his residuary trust fund "in the "first place to pay out of such income to my said wife "during her life without power of anticipation during any "converture such a sum as will together with the annual "income received by her under my marriage settlement dated "the twenty-seventh day of April one thousand nine hundred "and five produce an annual income for her of two thousand "pounds free of all taxes (including income tax) and duties." The widow remarried on July 15, 1926, and, after 1932, or thereabouts, she and her husband resided in Kenya Colony. Income tax was payable under the law of Kenya Colony on so much of her income under the marriage settlement and the testator's will as was received by her in that country.

A summons was taken out by the sole surviving trustee of the will for the determination of the question whether or not the annual income to which the income of the widow was to be made up out of the testator's residuary estate was to be calculated free of the taxes which were payable by her or on her behalf under the law of Kenya Colony.

Geoffrey Cross for the applicant.

Danckwerts for the testator's widow. The widow is entitled to receive the annuity free of the income tax payable under the law of Kenya Colony. *In re Norbury* (1) is distinguishable, because totally different considerations applied in that case. He also referred to *In re Quirk* (2).

Raymond Jennings for a residuary legatee. The income tax payable under the law of Kenya Colony is payable by the widow and not out of the residuary estate of the testator. The testator, in giving this direction, is not likely to have contemplated an additional burden of this sort being placed on the annuity. The reasoning of Bennett J. in *In re Norbury* (1) applies to the present case.

FARWELL J. This summons raises a question of construction on the will of John Gordon Frazer. The question, although a short one, is not necessarily easy of solution. [His Lordship stated the facts, and continued :] There is, I think, one authority which, although it by no means disposes of this case, is of importance in considering what the right answer to the question is. That is the decision of Bennett J. in *In re Norbury* (1) which related to a gift of a pecuniary legacy free of duty. The question which Bennett J. determined was that the words "free of duty" applied only to duties imposed in this country and not duties payable in another country. The judgment, which is a short one, is in these terms: "I am told that there is "no direct authority upon the question raised for decision by "the summons now before me. The point is not covered by "the decision of the Court of Appeal in *In re Scott* (3). An "English testator must be presumed to know something about "the duties the English law imposes both upon his estate "and upon beneficiaries under his will when he dies ; but not "many of them, I suppose, know much if anything about "death duties imposed by the laws of foreign countries. Nor,

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(1) [1939] Ch. 528.
(2) [1941] Ch. 46.
(3) [1915] 1 Ch. 592.

FARWELL J.

1941

FRAZER, *In re.* FRAZER *v.* HUGHES.

"I suppose, would many of them contemplate some additional "burden being imposed upon their estates by a change of "residence on the part of a person to whom a legacy had "been given. In the absence of authority, I hold that, where "an English testator by an English will gives a pecuniary "legacy 'free of duty,' the only duties payable out of his "estate in respect of the legacy are duties imposed by English "law, unless there are words in the will which make it clear "that duties imposed by the law of a foreign country are to be "paid thereout." So that Bennett J., having to decide the meaning of "a gift of a pecuniary legacy free of duty" came to the conclusion that the testator intended only such duties to be paid as were properly payable under the law of this country and any duty which the legacy might attract under any foreign law was not covered by the term "free of duty."

This decision was not followed by Morton J. in *In re Quirk* (1). In that case a British subject ordinarily resident in Turkey by his will devised "free of all death duties" certain freehold land in France. On his death there was payable in respect thereof a French duty on transfer by death. No other duty in England or elsewhere was payable in respect of it, either at the date of his death or at the date of the will. It was held that this duty was payable out of the estate and not by the devisee. Morton J. in that case said in terms that he agreed with the decision of Bennett J., but that he found in the case before him certain particular differences which in his view differentiated his case from that before Bennett J. On those grounds Morton J. came to the conclusion that in the particular case before him the duty imposed by the foreign law was payable out of the estate. It is quite plain on the language used by Morton J., that, had there not been very clear distinguishing factors in the case before him, he would have followed the decision of Bennett J. In my view, Morton J.'s decision does not assist me at all in arriving at a decision in the present case. I have only mentioned it because it has been referred to and Morton J. distinguishes it from the decision of Bennett J. in *In re Norbury* (2).

(1) [1941] 1 Ch. 46.

(2) [1939] Ch. 528.

In my judgment the decision in *In re Norbury* (1) does not exactly cover the question which I have to determine. This question is different in many ways from that which Bennett J. had to consider. Instead of the testator giving a pecuniary legacy free of duty, he has given an income which is to be calculated so as to provide an annual income for his wife of 2000*l.* free of all taxes including income tax and duties. The testator in the case before me was an Englishman ordinarily domiciled in this country. He described himself as a major in the Dorsetshire Regiment and of the Sports Club, St. James's Square, in the county of London, and it is not suggested that he had a domicile in any other country or that he was other than a domiciled Englishman. When he comes to provide for his widow he is obviously anxious that she should have an income which, together with the income she received under her marriage settlement, should give her a clear sum of 2000*l.* a year, and that that yearly sum should not be reduced by the burden of taxes including income tax and duties. That is clearly his intention, and the only question is whether the intention of the testator, as so expressed, is sufficient to include in that which the lady is entitled to have paid to her, tax which is payable, not by the law of this country, but which is imposed by the law of Kenya and has become payable because the lady has taken up her residence in Kenya.

On behalf of the lady it is said that the phrase "free of "all taxes (including income tax) " must mean taxes of every sort or description wherever imposed and by whatever law imposed. On the other hand, I am invited to say that when the testator, being a domiciled Englishman, provides for the payment of all taxes (including income tax) and duties he did not mean any taxes other than such taxes, including income tax, as were imposed by the laws of this country. It is said that, if the testator had said "free of all duties," following the decision of Bennett J. I should be bound to come to the conclusion that "duties " must mean only English duties, and that it would be inconsistent with that decision to hold that the term "all taxes " was not confined to taxes imposed by the laws of this country but included all taxes imposed in a foreign country which fell to be borne by the lady by reason of her change of residence and the fact that she had elected to live out of this country.

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(1) [1939] Ch. 528.

One passage in Bennett J.'s judgment, I think, has some bearing on the point. He says: "Nor, I suppose, would "many of them contemplate some additional burden being "imposed upon their estates by a change of residence "on the part of a person to whom a legacy had been "given." Similarly in the present case, when the testator made his will, it is difficult to suppose that he was contemplating the possibility of his widow taking up her residence in some country other than England and thereby incurring liability to some tax imposed by a foreign country. Nevertheless I have to deal with what is a very wide term, because the lady is to be relieved, so far as the income is concerned, of all taxes, including income tax and duties. Am I properly entitled to limit "all taxes" to taxes imposed by the laws of this country, or am I to read "all taxes" as meaning taxes imposed anywhere by any law in any country other than this country? I feel a difficulty. The term "all taxes" is very wide and prima facie certainly would include a tax imposed in respect of the income by any country in which the lady happened to be living.

But that is not the conclusion to which I think I ought to come. I think that I should adopt the reasons given by Bennett J., although I am not suggesting that his decision covers this case or is itself a decision which I am in any way bound to follow. I think that when the testator gave the lady an income and directed that the amount of it should be calculated free of payment of all taxes including income tax and duties, he was only contemplating such taxes and duties as were properly payable from time to time under the laws of this country and that he did not contemplate or intend to include a tax to which the lady has become liable solely by reason of her change of residence after his death.

In the circumstances, I think that the proper answer in this case is that the income tax to which the lady has now become liable under the law of Kenya by reason of her residence in Kenya is not a deduction which was contemplated by the testator; that that tax, therefore, is not included in the term "free of all taxes (including income tax)," and that, consequently so far as that tax is concerned it must be borne by her and not by the testator's residuary estate.

Solicitors: *Kimber Bull, Howland, Clappé & Clarke; Mackrell, Ward & Knight.*

J. L. D.

SIMONDS J.

1941 May 7.

In re WOODHOUSE.

PUBLIC TRUSTEE *v.* WOODHOUSE.

Will—Administration—Residuary estate—Reversionary interest—Not immediately realized—Benefit to tenant for life—Apportionment of fund on sale.

The rule in *In re Earl of Chesterfield's Trusts* (1883) 24 Ch. D. 643, by which (that the court may deal fairly, in the administration of estates, between persons having successive interests in a residuary estate subject to the trusts of a will) the tenant for life derives some benefit from a reversionary interest forming part of a testator's estate, which, in the interests of the proper management of the estate, is not immediately realized, is confined to reversionary interests in personal estate and has no application to realty.

In re Searle [1900] 2 Ch. 829, and *In re van Straubenzee* [1901] 2 Ch. 779, considered.

By his marriage settlement, dated September 1, 1909, the testator, Samuel Thomson Woodhouse, settled certain perpetual rent charges and a freehold house on trust for his wife for life and after her death on certain trusts which did not take effect, with, subject thereto, an ultimate trust in his own favour. By a voluntary settlement of the same date he settled certain perpetual rent charges on trust for his sister for her life with a reversion in his own favour. These two reversionary interests were in the possession of the testator at the date of his death. By his will, dated December 22, 1910, he devised and bequeathed all his real estate of every tenure and all his personal estate on trust for sale. He gave his trustees the fullest power and discretion to postpone the sale and conversion of any part of his property and directed them to hold his residuary real and personal estate "including all property not "sold or converted and the proceeds of the sale and conversion "of such part of my residuary real and personal estate as has "for the time being been so sold or converted and all moneys "investments and property for the time being representing my "residuary estate (all of which are hereinafter referred to as "my residuary estate) on trust to pay the income of a moiety "of my residuary estate (hereinafter called 'the first moiety "'of my residuary estate') to my said wife during her life "and after the death of my said wife my trustees shall hold "the first moiety of my residuary estate and the income "thereof" on the trusts mentioned in the will. The testator further directed that his trustees should pay the income of the other moiety of his residuary estate to his sister during her life and directed them after her death to hold that moiety on the trusts mentioned in the will. The testator died on January 19, 1912. His widow died on December 19, 1939, and his sister died on September 21, 1940. There was other estate of considerable value, in addition to the reversionary interests, which became subject to the trusts of the testator's will concerning his residuary estate. The trustees did not sell either of the reversionary interests. The freehold house was sold in 1916.

A summons was taken out by the executors of the will of the testator's widow for the determination of the question (inter alia) whether, on a sale by the Public Trustee (sole trustee of the testator's will) of the rent charges (1.) the proceeds of the sale of the rent charges, and (2.) the proceeds of the sale of the freehold house, ought to be apportioned by the Public Trustee between the estate of the testator, on the one hand, and the estates of the widow and the testator's sister, on the other hand, in accordance with the rule in *In re Earl of Chesterfield's Trusts* (1), or otherwise.

H. A. Rose for the Public Trustee.

Roxburgh K.C. and *Sir Norman Touche* (for *Harold Brown*, on war service) for the residuary legatees. There can be no apportionment here because the fund which it is sought to apportion is a mixed fund of realty and personalty and *In re Earl of Chesterfield's Trusts* (1) does not apply to real estate. Admittedly, there is no direct authority that the rule is not applicable to real estate, but there are dicta in *In re Searle* (2) and *In re van Straubenzee* (3) which suggest that the rule should not extend to

(1) (1883) 24 Ch. D. 643.
(2) [1900] 2 Ch. 829, 834.
(3) [1901] 2 Ch. 779.

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realty. In *In re van Straubenzee* (1) it is stated that the rule in *Howe* v. *Earl of Dartmouth* (2) has never been applied to real estate: see also Jarman on Wills, 7th ed., vol. ii., p. 1208. The tenant for life is prima facie not entitled to anything in respect of these reversionary interests. They referred to *Mackie* v. *Mackie* (3).

Vaisey K.C. and *J. M. Easton* for the executors of the widow. It was the duty of the trustees to sell at a profit. They never had in their minds the fact that they were under a duty to sell, and they never sold, but in equity that which ought to be done must be deemed to have been done. The overriding trust for sale must be deemed to have been exercised, so that this property, at the moment of the testator's death, fell to be dealt with as personal estate. The fact that the trustees did not exercise their discretion does not alter the rights of the tenant for life.

SIMONDS J. [after stating the facts, continued:] The question of sale never having been considered by the trustees during the lives of the tenants for life, because the trustees never thought it their duty to sell, a claim is put forward on behalf of the representatives of the widow that the rule known as the rule in *In re Earl of Chesterfield's Trusts* (4) ought to be applied and that there ought to be some apportionment of the rent charges or their value as between the tenants for life and the persons in whom the reversion is now vested under the will. I have, therefore, to consider the question whether the rule in *In re Earl of Chesterfield's Trusts* (4) is applicable to real estate.

This is an equitable rule established by this Court in order to deal fairly in the administration of estates between persons having successive interests in a residuary estate. It is a rule of administration which, in my judgment, is to be regarded as complementary to other rules of administration established also to do justice as between persons entitled to successive interests, as, for example, the rule in *Howe* v. *Earl of*

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(1) [1901] 2 Ch. 779.
(2) (1802) 7 Ves. 137.
(3) (1845) 5 Hare, 70.
(4) 24 Ch. D. 643.

Dartmouth (1). The latter is a well established rule under which a tenant for life of residuary personal estate is not entitled to the whole of the income of such investments as are not authorized by the trusts of the will. So, also, where personal estate is bequeathed on trust for sale, in the absence of express provision, the tenant for life is not entitled to the whole of the income of the investments which are retained unsold but are unauthorized by the terms of the will. It is, in my judgment, as a complementary rule to those rules that the rule in *In re Earl of Chesterfield's Trusts* (2) has been established, whereby the tenant for life gets some benefit from a reversionary interest forming part of the testator's estate, which, in the interests of the proper management of the estate as a whole, is not immediately realized. If the reversionary interest is not sold, then it is right that the tenant for life should get some benefit, for, if it were sold he would get the income of the proceeds of sale, and, just as the reversioner is benefited by the earlier rules which I have mentioned, for instance, the rule in *Howe* v. *Earl of Dartmouth* (1), so the tenant for life is benefited by the application of the rule established in *In re Earl of Chesterfield's Trusts* (2). It is noteworthy that those other rules have been established only in regard to personal estate. It is, I think, beyond controversy that the rule in *Howe* v. *Earl of Dartmouth* (1) is not applicable to residuary real estate. Equally, where real estate is devised on trust for sale, the tenant for life is entitled to the whole of the net rents and profits until sale. That was established long since in *Casamajor* v. *Strode* (3). In no case in the books, so far as I am aware, has the rule in *In re Earl of Chesterfield's Trusts* (2) been applied to the case of real estate, and, although it may be correct to say that there are only dicta with regard to its application to real estate, I think that they are dicta which I ought not to disregard.

In *In re Searle* (4), Kekewich J. says: "The question in "this case really is whether the testator's widow is entitled "to the rents and profits until sale of the real estate which

(1) 7 Ves. 137.
(2) 24 Ch. D. 643.
(3) (1809) 19 Ves. 390(*n*).
(4) [1900] 2 Ch. 829, 832, 834.

"was devised upon trust for sale, and to pay her the income "of the proceeds during her life, with a power to postpone "the sale during her life at the discretion of the trustees. If "she is so entitled, of course she is a tenant for life, and entitled "to exercise the powers of a tenant for life under the Settled "Land Act. Mr. Rolt's argument is based entirely on this— "that the law is settled as regards personal estate that where "there is a trust for conversion, and no specific gift to the "tenant for life of the income of existing investments until "conversion, the tenant for life is not entitled to the actual "income, but to something else, and that there is no reason "for any distinction between real estate and personal estate. "I think that that argument is unsound. Why there should "be that distinction between personal and real estate is not "for me to inquire; but the distinction runs through many "cases, which show that for many purposes real and personal "estate must be considered on a different footing." Then he refers, among other cases, to that of *Casamajor* v. *Strode* (1) which I have already cited, and then says: ". . . . in the case "of real estate, if the estate produces nothing, the tenant for "life can get nothing, whereas in the case of personalty he "would get something upon the principle last shown in *In re* "*Earl of Chesterfield's Trusts* (2)." In *In re van Straubenzee* (3), Cozens-Hardy J. said: "Now, so far as I am aware, the rule "in *Howe* v. *Earl of Dartmouth* (4) has never been applied except "to a disposition by will of residuary personal estate given "as one fund to be enjoyed by several persons in succession."

Those two cases are, in my view, valuable as illustrating that in the course of administration a divergence exists between real and personal estate, and, if I am right in thinking that the rule in *In re Earl of Chesterfield's Trusts* (2) is really to be regarded as complementary to the other rules, it seems to me clear that, as those rules do not apply to real estate, so also the rule in *In re Earl of Chesterfield's Trusts* (2) ought not to apply to it. I think that it may be tested in this way. As between tenant for life and reversioner it would be manifestly

(1) 19 Ves. 390(*n*).
(2) 24 Ch. D. 643.
(3) [1901] 2 Ch. 779, 782.
(4) 7 Ves. 137.

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unfair if the rule in *In re Earl of Chesterfield's Trusts* (1) did apply and the other rules did not, and yet, on the authorities, it would appear quite clear that the other rules do not apply to the case of real estate.

I should add this. The view which I am taking as to the application of the rule to real estate is the view also taken in Jarman on Wills, 7th ed., p. 1208, where, indeed, the learned editor does not expressly refer to *In re Earl of Chesterfield's Trusts* (1), but he says this: "The rule"—that is, the rule in *Howe* v. *Earl of Dartmouth* (2)—"as formulated by Lord "Eldon only applies to residuary gifts of personal estate and "it is generally assumed not to apply to real estate." The same view is also taken by the learned editor of Gover on Capital and Income, 3rd ed., p. 191, where the rule in *In re Earl of Chesterfield's Trusts* (1) is in terms stated as a rule in regard to personal estate.

I come to the conclusion, therefore, that the rule in *In re Earl of Chesterfield's Trusts* (1) has no application to the reversionary interests in realty which were comprised in the residuary estate of the testator.

Solicitors: *Woodcock, Ryland & Co., for Brooks, Marshall, Moon & Co., Manchester; Morecroft, Sproat & Co., Liverpool; Cunliffe & Airy, for Tatham, Worthington & Co., Manchester.*

(1) 24 Ch. D. 643.
(2) 7 Ves. 137.

J. L. D

C. A.

1941

April 8.

AUSTINS OF EAST HAM, LIMITED *v.* MACEY.

[1940 A. 425.]

Emergency legislation—Judgment—Enforcement—Vendor and Purchaser—Contract for sale of land—Order for specific performance—Failure to comply—Motion for rescission—Motion not a proceeding for enforcement of judgment for payment or recovery of money—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 1.

Under a contract for the sale of land which contained no provision for the payment of a deposit, the vendors obtained against the purchaser an order for specific performance of the contract and on the failure of the purchaser to comply with that order they moved for an order for rescission of the contract:—

Held (affirming the decision of Farwell J.), that the vendors were not thereby seeking to obtain "the enforcement of any "judgment or order . . . . for the payment or recovery of a "sum of money" within s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1939, and, therefore, that no previous leave to move for the order of rescission was required under the Act. The vendors were seeking not to enforce the judgment for specific performance but to exercise their alternative remedy under the contract.

Broadstairs Picture House, Ld. v. *Littman* [1940] Ch. 860, approved without deciding whether it would make any difference if there was an order for forfeiture of deposit.

APPEAL from Farwell J.

By an agreement dated December 1, 1928, the plaintiffs agreed to sell to the defendant land for the erection of flats thereon for the sum of 660*l.*, to advance sums for the erection of the flats, and to convey the property to the defendant when the flats were completed on payment of the 660*l.*, all advances, and a further sum of 125*l.* No deposit was paid, and the defendant defaulted in completing the purchase. Accordingly, on June 11, 1940, the plaintiffs obtained an order for specific performance of the contract by which it was directed that the defendant should pay to the plaintiffs the amount certified by the master to be due against delivery by the plaintiffs of the conveyance duly executed by them. In December, 1940, the master made his certificate and fixed a date for completion. The defendant failed to comply with the order for specific performance and the plaintiffs moved in the action for an order for rescission of the contract. The defendant resisted the application on the ground that the leave of the Court had first to be obtained under the Courts (Emergency Powers) Act, 1939, because, in moving for rescission, the plaintiffs were indirectly proceeding to execution of a judgment or order "for the payment or recovery of a sum of money" within s. 1, sub-s. 1, of the Act. Farwell J. following the decision of Bennett J. in *Broadstairs Picture House, Ld.* v. *Littman* (1), made the order for rescission. The defendant appealed.

J. A. Wolfe for the appellant. Farwell J. ought not to have made the order for rescission because it was first necessary for the plaintiffs to obtain the leave of the court under the Courts (Emergency Powers) Act, 1939. Farwell J. purported to follow *Broadstairs Picture House, Ld.* v. *Littman* (1) and it is admitted that that case is indistinguishable, and indeed goes further, because there the order was not merely for rescission but was also for forfeiture of a deposit. The order for specific performance was an order for the payment of a sum of money. [CLAUSON L.J. The order for rescission does not enforce the judgment but gets rid of it.] It does not wipe out the order for specific performance. It gives the vendors something which would have been available to them if they had not asked for specific performance. The vendors are obtaining something corresponding to execution of a judgment for payment of a debt due under a contract, and s. 1, sub-s. 1, of the Act applies.

Lindsay M. Jopling for the respondents. *Foligno* v. *Martin* (2) is the first reported case in which the order now complained of was made and it has been followed ever since. By it a person who has obtained an order for specific performance can come to the court and obtain the alternative remedy of rescission if he does not think it worth while trying to enforce his judgment

(1) [1940] Ch. 860.

(2) (1853) 16 Beav. 586.

for specific performance. The contract is still on foot after the order for specific performance and the right of rescission conferred by the contract is still available. The vendor could recover without coming to the court were it not for the order for specific performance which has to be got rid of. There is no ground, therefore, for saying that before rescission is ordered leave must be obtained from the court under s. 1, sub-s. 1, of the Act of 1939.

SIR WILFRID GREENE M.R. This appeal raises the short point whether, when a vendor has obtained an order for specific performance, and, later, on the purchaser failing to comply with that order, has further obtained, on motion, rescission of the contract, the latter order is bad on the ground that the leave of the court to proceed, under the Courts (Emergency Powers) Act, 1939, ought first to have been obtained. It is said that a vendor who in these circumstances moves for the rescission of the contract is within the language of s. 1, sub-s. 1, of the Act proceeding to "the enforcement of any "judgment or order . . . . for the payment or recovery of a "sum of money."

The order for specific performance in the present case was in the form which is sometimes known as the *Robinson* v. *Galland* (1) form. It directs the purchaser to pay the amount certified by the master to be due under the contract and the vendor to deliver a conveyance, and on such an order the vendor is entitled to proceed to execution. The purchaser in the present case having made default in complying with the order for specific performance, the vendors moved to have the contract rescinded. Farwell J., without, as I understand, expressing any opinion of his own, followed a decision of Bennett J. in *Broadstairs Picture House, Ld.* v. *Littman* (2). That case was precisely on all fours with the present case, subject to the one qualification that there the vendors were seeking to forfeit the deposit paid as well as to obtain rescission of the contract. That element, if anything, made the case a stronger one in favour of the purchaser than is the present. It is said by Mr. Wolfe, on behalf of the purchaser, that a motion to the court for rescission in circumstances such as those existing in the present case is a method of enforcing the order for specific performance, and he analysed the order by saying that as the result of it, the vendors were taking the purchaser's equitable interest in place of the debt created by the order for specific performance. I do not think that that is a correct analysis of the situation. An order for specific performance does not get rid of the contract. The contract is not merged in the order, but it is treated, and always has been treated by the court of equity, as still subsisting. That that is so, appears clear from the language of Romilly M.R. in *Foligno* v. *Martin* (1) which we are told is the first reported case in which the relief of rescission was granted. Romilly M.R. there said: "My opinion is, that the "plaintiff is entitled to get rid of the contract, unless the "defendant pays the purchase money before the first day of "next term."

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(1) (1889) 37 W. R. 396; 60 L. T. 697.

(2) [1940] Ch. 860.

That, in my opinion is correct language to use in relation to the situation. The contract is still there. Until it is got rid of, it remains as a blot on the title, and the position of the vendor, where the purchaser has made default, is that he is entitled, not to annul the contract by the aid of the court, but to obtain the normal remedy of a party to a contract which the other party has repudiated. He cannot, in the circumstances, treat it as repudiated except by order of the court and the effect of obtaining such an order is that the contract, which until then existed, is brought to an end. The real position, in my judgment, is that, so far from proceeding to the enforcement of an order for specific performance, the vendor, in such circumstances is choosing a remedy which is alternative to the remedy of proceeding under the order for specific performance. He could attempt to enforce that order and could levy an execution which might prove completely fruitless. Instead of doing that, he elects to ask the court to put an end to the contract, and that is an alternative to an order for enforcing specific performance. In my

(1) 16 Beav. 586, 587.

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opinion, the decision of Farwell J. was right and this appeal must be dismissed.

CLAUSON L.J. I agree, for the reasons given by the Master of the Rolls.

GODDARD L.J. I agree.

Appeal dismissed.

Solicitors: *Glover, Scott & Apthorpe-Webb; E. Edwards & Son.*

H. C. G.

Dictum of FARWELL, J., at p. 348, *applied. Re* RIDLEY (*decd.*). [1950] 2 All E.R. 1.

Applied. In re RIDLEY DECD. [1950] 1 Ch. 415

FARWELL J.

1941 May 15.

In re ROWE.

BENNETTS *v.* EDDY.

Administration — Pecuniary legacies — Personal estate insufficient to satisfy legacies—"I devise all my real estate and bequeath all the "residue of my personal estate"—Liability of real estate to contribute to payment of legacies — Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 3; *Sch. I., Part II., para.* 2.

A testator by his will, after bequeathing certain pecuniary legacies, directed as follows: "I devise all my real estate and "bequeath all the residue of my personal estate" to X and Y in equal shares. The personal estate was insufficient to satisfy the pecuniary legacies, but the real estate was amply sufficient for that purpose:—

Held, that the law in force before the Administration of Estates Act, 1925, relating to the payment of pecuniary legacies out of real estate has not been altered by s. 34 and Sch. I., Part II., para. 2, of that Act, and, accordingly, as the testator had not made the residue a mixed fund or given the real and personal estate as one mass to the residuary legatees, so as to bring into operation the rule in *Greville* v. *Browne* (1869) 7 H. L. C. 689, the pecuniary legacies were payable only out of the personalty.

In re Thompson [1936] Ch. 676 applied.

ADJOURNED SUMMONS.

The testator, James Rowe, by clause 3 of his will dated November 3, 1938, gave to a named person certain specific chattels. By clause 4 he gave five pecuniary legacies to various named persons. Clause 5 was as follows: "I devise "all my real estate and bequeath all the residue of my personal "estate to [two named persons] in equal shares." The testator died on October 23, 1939. His estate consisted of real estate and personal estate. The personal estate was insufficient to satisfy the pecuniary legacies given by the will, but the real estate was amply sufficient for that purpose.

A summons was taken out by one of the executors of the will to determine the question whether the five pecuniary legacies were payable exclusively out of the personal estate of the testator or also out of his real estate.

J. A. Wolfe for the applicant.

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Timins for one of the pecuniary legatees. The pecuniary legatees can look to the real estate for the payment of their legacies. In such a case as the present the court takes a liberal view, and, where it is possible to do so, construes a will so as to render the real estate liable. [He referred to Jarman on Wills, 7th ed., vol. ii., p. 915.] Assuming that the real estate would not have been liable under the law as it was before 1926, that law has been changed by the Administration of Estates Act, 1925, s. 34, sub-s. 3, and Sch. I., Part II., para. 2 (1), which for the present purpose to a great extent placed real property on the same footing as personal property. By s. 34, sub-s. 3, the testator's "real and personal "estate" is to be "applicable towards the discharge of "the . . . . testamentary . . . . debts and liabilities." Pecuniary legacies are "testamentary . . . . debts and "liabilities" within the meaning of the sub-section and by Sch. I., Part II., para. 2, refers to "property of the deceased "not specifically devised or bequeathed but included . . . . "in a residuary gift, subject to the retention out of such "property of a fund sufficient to meet any pecuniary legacies, "so far as not provided for as aforesaid." The real estate in the present case was not, on the construction of the will, "specifically devised." It was included with the residue of the personal estate in a general gift to the two residuary legatees. The real estate, therefore, becomes applicable

(1) By s. 34, sub-s. 3, of the Administration of Estates Act, 1925, it is provided: "Where the "estate of a deceased person is "solvent his real and personal "estate shall, subject to rules of "court and the provisions hereinafter contained as to charges "on property of the deceased, and "to the provisions, if any, contained in his will, be applicable "towards the discharge of the "funeral, testamentary and administration expenses, debts and "liabilities payable thereout in "the order mentioned in Part II. "of the First Schedule to this "Act."

Sch. I., Part II., provides, under the heading "Order of "application of assets where the "estate is solvent: (2.) Property "of the deceased not specifically "devised or bequeathed but included (either by a specific or "general description) in a residuary gift, subject to the retention out of such property of a "fund sufficient to meet any "pecuniary legacies, so far as "not provided for as aforesaid."

under Sch. I., Part II., para. 2, for the payment of the pecuniary legacies under s. 34, sub-s. 3. In *In re Worthington* (1) it was held that the order of the application of assets in the schedule applied to legacies. [He also referred to *In re Thompson* (2).]

R. W. Goff for another pecuniary legatee. The only construction that can possibly be put on para. 2 of Part II. of Sch. I. is that any property in such a residuary gift as that in the present case, whether real or personal, is a fund liable for the payment of these pecuniary legacies. As the personal estate is insufficient, the real estate is liable to make good the deficiency.

Raymond Jennings for the residuary legatees. If the devise of real property in the present case were a residuary gift, it would be difficult to dispute that a payment must be made out of the real estate to satisfy the pecuniary legacies. The devise of this real estate is not, however, a gift of residue, and, therefore, para. 2 of Part II. of Sch. I. to the Act of 1925 does not apply here. Sect. 34 of the Administration of Estates Act, 1925, is not intended to alter the law as laid down in *Greville* v. *Browne* (3), that pecuniary gifts are primarily payable out of personalty, and only where the testator has designated his residue as a general mixed fund is the realty also liable. [He referred to *In re Thompson* (2) and *Wells* v. *Row* (4), and to Hawkins on Wills, 3rd ed., p. 342.]

FARWELL J. This summons raises a question, which, I think is not free from difficulty—a question primarily of the construction of the will, dated November 3, 1938, of James Rowe, who died on October 23, 1939.

[His Lordship stated the facts and read the clauses of the will set out above, and continued :] The question which I have to determine is whether the pecuniary legacies given by the will are properly payable only out of the personal estate or also out of his real estate.

It is important to remember the state of the law with

(1) [1933] Ch. 771.
(2) [1936] Ch. 676.
(3) (1859) 7 H. L. C. 689.
(4) (1879) 48 L. J. (Ch.) 476.

regard to this matter before the Administration of Estates Act, 1925, came into operation. That law was well established and it is not disputed that under it pecuniary legatees, in the absence of express words charging the real estate with the payment of the legacies, had to look to the personal estate and could not look to the real estate for the payment of the legacies, and would therefore have to go short in so far as the personal estate was insufficient to satisfy them, unless the testator had made the residue a mixed fund or given the real and personal estate as a mass to the residuary legatees. In that case the real estate would be chargeable with the payment of the pecuniary legacies in accordance with what is generally known as the rule in *Greville* v. *Browne* (1). That rule is stated in Hawkins on Wills, 3rd ed., p. 342, in this way: "If legacies are given generally, and the residue of the real "and personal estate is afterwards given in one mass, the "legacies are charged on the residuary real as well as the "personal estate."

It is not suggested in the present case that the testator has done anything to make a mixed fund or to dispose of his real and personal estate as one mass after paying the legacies as given in the earlier part of the will. When he comes to deal with his property, after having given these legacies, he treats the real and personal estate as quite separate. He says: "I devise all my real estate and bequeath all the residue of "my personal estate." Until 1926, therefore, there could only have been one answer to the question raised by the summons, namely, that the real estate of the testator was not in any way liable to pay the pecuniary legacies.

It is said, however—and this is the real question in this case—that the effect of the Administration of Estates Act, 1925, has been to alter the law and that that alteration is effected by s. 34 of the Act, together with the provisions of Sch. I., Part II., para. 2.

[His Lordship read the provisions of the Act above set out, and continued:] It is argued that the effect of para. 2 of Part II. of Sch. I. to the Act is that the real estate, although

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(1) 7 H. L. C. 689.

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not given as a mass with the personal estate to the persons entitled to the residuary estate of the testator, nevertheless must bear with the residuary personal estate a proportion of the pecuniary legacies. The matter is not free from difficulty, nor is it, so far as I know, exactly covered by authority. The only case to which I have been referred that has any bearing on this question is *In re Thompson* (1) before Clauson J. In that case the testator bequeathed an annuity and certain legacies and then devised and bequeathed all his real and personal estate not otherwise devised or bequeathed to certain persons. He left personal estate and real estate of considerably greater value. Questions arose, in connection with the incidence of death duties, whether the annuity and legacies were to be treated as payable primarily out of the residuary personalty or out of the realty and personalty in proportion to their values. It was held that the law in force before the Administration of Estates Act, 1925, as regards the primary fund for the payment of legacies as between the personal and real estate had not been altered by s. 34, sub-s. 3, and cl. 2 and cl. 8 (*b*) of Part II. of Sch. I. to that Act, that the personal estate must be treated as primarily liable, and that recourse could not be had to the real estate until the personal estate had been exhausted. That case does not decide the question which I am asked to decide, but I think it throws light on it, because Clauson J. considered para. 2 of Part II. of the Schedule and said: " The last words mean, so far as not "provided for out of the part of the estate as to which the "testator died intestate. It is suggested that the effect "of that provision is to alter the law, and to provide that the "fund which is to be retained out of residuary realty and "personalty in order to meet pecuniary legacies is to be "retained in the following way: that a proportionate part is "to be retained out of realty and personalty pro rata of the "amount of the realty and personalty respectively. The "provision does not say so, and the provision is not concerned "with any such matter. The provision is concerned with "the way in which funeral testamentary and administration

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(1) [1936] Ch. 676.

"expenses, debts and liabilities are to be met. There is no "indication there that there is any intention of altering the "law in respect of the rights of the legatees as against those "interested in the residuary personalty and residuary real "estate, or in respect of the rights inter se of those interested "in the residuary realty and personalty respectively, as "regards bearing the charge of legacies, and I can see no "foundation for the suggestion that that provision has in any "way altered the law as laid down in *In re Boards* (1)."

Clauson J., therefore, when considering the question which he had to consider in that case, did not accept the view that this provision in the Administration of Estates Act, 1925, had in any way altered the law as it was before the Act came into force. That, I think, has some bearing on the question before me whether the effect of the provisions of the Act to which I have referred is to alter the law and render real estate chargeable with the payment of pecuniary legacies, although it would not be so chargeable under the rule in *Greville* v. *Browne* (2). I have come to the conclusion, although with some doubt, that the Administration of Estates Act, 1925, has not altered the law as it was before that Act came into operation. It seems to me that in so deciding I am acting in accordance with the principle which Clauson J. adopted in *In re Thompson* (3). Accordingly, I hold that the " property of the "deceased not specifically devised or bequeathed but included "by a specific or general description in a residuary gift " for the purpose of Sch. I., Part II., para. 2, of the Act does not include the real estate of the testator in this case: for according to the construction which I place upon this particular will the real estate is devised, not as part of the residue, but as a specific devise to the named persons, the residue which is given being the residue of the personal estate.

As I have said I think that the question raised by this summons is not at all easy to answer and it may well be that the matter would strike other minds in a way other than that in which it has struck mine ; but I can only give effect to what

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(1) [1895] 1 Ch. 499.
(2) 7 H. L. C. 689.
(3) [1936] Ch. 676.

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I think is the true result of the language of this particular will and the construction of the Administration of Estates Act, 1925, and I have come to the conclusion, on the whole, that the law as it was before 1926 has not been altered, and that accordingly as there is in this case not a residuary estate which consists of a mixed fund or one mass of real estate and personal estate, so as to bring into operation the rule in *Greville* v. *Browne* (1), but a devise of the real estate and a bequest of the residue of the personal estate, the pecuniary legacies are payable only out of the residuary personalty and the persons who are given the real estate take it free from any liability to contribute towards the pecuniary legacies.

Solicitors: *Robbins, Olivey & Lake, for Boase & Bennetts, Penzance; Burton, Yeates & Hart, for Vivian Thomas & Son, Penzance.*

(1) 7 H. L. C. 689.

J. L. D.

MORTON J.

1941

April 29 ; *May* 2.

In re APPLICATION BY MIDLAND BANK, LIMITED.

Emergency legislation—Mortgage—Enforcement—Mortgage to cover borrowing of third party—No covenant to repay by mortgagor—Leave to mortgagee to appoint receiver and realize security—Mortgagor not " person liable . . . . to perform the obligation "—Courts (Emergency Powers) Act, 1939 (2 & 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-ss.* 2 (*a*) (ii.), (iv.) ; 4.

By s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1939 : " . . . . a person shall not be entitled, except with the leave " of the appropriate court—(*a*) to proceed to exercise any remedy " which is available to him by way of— . . . . (ii.) . . . . the " appointment of a receiver of any property ; . . . . (iv.) the " realization of any security or the forfeiture of any deposit." By sub-s. 4 : " If, on any application for such leave as is required " under this section for the exercise of any of the rights and " remedies mentioned in subsections (1.), (2.) and (3.) of this " section, the appropriate court is of opinion that the person " liable to satisfy the judgment or order, or to pay the rent or " other debt, or to perform the obligation, in question is unable " immediately to do so by reason of circumstances directly or " indirectly attributable to any war in which His Majesty may " be engaged, the court may refuse leave for the exercise of that " right or remedy, or give leave therefor subject to such restrictions " and conditions as the court thinks proper."

A mortgagor who covers the borrowing of a third party, but does not covenant personally to repay the moneys lent is not " the person liable . . . . to perform the obligation " within sub-s. 4, and so is not protected thereby, and the fact that the third person is unable to perform his obligation by reason of circumstances attributable to the war does not affect that position. The case is casus omissus, and the omission to provide for it may work much hardship. Even in such a case, however, a mortgagee wishing to exercise the remedies specified in s. 1, sub-s. 2 (*a*), (ii.), (iv.), must obtain leave.

National Provincial Bank, Ld. v. *Liddiard,* ante p. 158, considered.

MOTION.

By this motion William Franklin (hereinafter called "the "surviving mortgagor ") asked the court to reverse an order of the master giving to Midland Bank, Ld., leave, under the Courts (Emergency Powers) Acts, 1939 and 1940, to exercise any remedy available to it by way of the appointment of a receiver and the realization of its security under a mortgage dated May 5, 1937, and made between John Lavenstein and the surviving mortgagor of the one part, and the bank of the other part.

The mortgage was of certain property made "in consideration "of the bank, at the request of the mortgagor, making or "continuing advances or otherwise giving credit or affording "banking facilities for as long as the bank may think fit to "L.T.C., Ld., 74, Great Hampton Street, Birmingham (hereinafter called the principal), upon the terms that the bank shall "be secured as hereinafter appearing." The principal debtor in respect of the debt to secure which the mortgage was given was the company. The deed contained no covenant by the mortgagor to pay the sum advanced by the bank to the company, or any part of it, but counsel for the surviving mortgagor in argument relied on two passages in the deed, as follows. The first passage was in the following terms: "And it is "hereby also agreed and declared that although as between the "principal and the mortgagor the said premises" [i.e., the mortgaged premises] "may be liable and charged only "secondarily and by way of guarantee yet as between the "mortgagor and the bank the said premises shall be deemed "to be liable and charged primarily and as for moneys primarily "due from the mortgagor and accordingly that the bank "shall be at liberty without thereby affecting their rights "hereunder at any time to determine enlarge or vary any "credit to the principal to vary exchange or release any other "securities held or to be held by the bank for or on account "of the moneys intended to be hereby secured or any part "thereof to renew bills and promissory notes in any manner "and to compound with give time for payment to accept "compositions from and make any other arrangements with "the principal or any obligants on bills notes or other securities "held or to be held by the bank for or on behalf of the principal." The second passage was as follows: "And it is hereby lastly "declared that although the liability of the mortgagor hereunder cannot exceed the value of the said premises yet "these presents shall be construed and take effect as a guarantee "of the whole and every part of the principal moneys and "interest owing and to become owing as aforesaid and accordingly the mortgagor shall not be entitled as against the bank "to any right or proof in the bankruptcy or insolvency of the "principal or other right of a surety discharging his liability "in respect of the principal debt unless and until the whole "of such principal moneys and interest shall have first been "completely discharged and satisfied."

In 1941 the bank applied to the court, under the Courts (Emergency Powers) Acts, 1939 and 1940, for leave to exercise any remedy available to it by way of the appointment of a receiver and the realization of its security. The surviving mortgagor (John Lavenstein being then dead) contended before the master that he was "the person liable to . . . . "perform the obligation" within s. 1, sub-s. 4, of the Courts (Emergency Powers) Act, 1939, and that he could not do so because of circumstances attributable to the war, and he filed evidence that the war had ruined the company's business. The master, however, held that, because he was not under any personal liability to discharge the debt secured by the mortgage he was not "the person liable to . . . . perform the "obligation" within the sub-section, and, therefore, was not entitled to the protection of it, and he gave the bank the leave for which it applied. The surviving mortgagor now moved the court to reverse the master's order.

Lindner for the surviving mortgagor. The master's order was wrong and ought to be reversed. He based it on the decision of Farwell J. in *National Provincial Bank, Ld.* v. *Liddiard* (1), which he held covered the present case. He was, however, wrong in so holding, for, on the true construction of the mortgage in the present case, the surviving mortgagor is personally liable for the debt, though only to the extent of an amount equal to the value of the property. If, however, that argument is wrong, and *National Provincial Bank, Ld.* v. *Liddiard* (1) does cover the present case, the master's order, which is not the same as the order made by Farwell J., is still wrong on the facts. Farwell J. dismissed the application before him on the ground that no leave was necessary as the mortgagor was not protected by s. 1, sub-s. 4, and the case was casus omissus. In this case, however, the master has explicitly purported to follow *National Provincial Bank, Ld.* v. *Liddiard* (1) in holding that the case is casus omissus, and yet has granted to the bank the leave which it asked. That is inconsistent. The master, purporting, as he did, to follow Farwell J., ought to have dismissed the summons.

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(1) Ante p. 158.

Guest Mathews for the bank. The master was right. Farwell J., by the order which he made in *National Provincial Bank, Ld.* v. *Liddiard* (1), placed the bank in that case in a position of complete freedom to exercise any available remedy. He did so, however, for the wrong reason and in the wrong way. He held rightly that the case was casus omissus since the mortgagor could not come within the sub-section and be protected by it, but wrongly that, for that reason, leave was unnecessary. Sect. 1, sub-s. 2, makes it perfectly plain that leave is necessary, and that necessity is not affected by the fact that in certain instances a mortgagor cannot come within sub-s. 4. The proper course was to grant the bank the leave for which it asked. In the present case, the master followed Farwell J. in holding the case to be casus omissus, and he did not hold that leave was unnecessary, but granted it. That order should be upheld.

Cur. adv. vult.

1941. May 2. MORTON J. [after stating the facts set out above and reading the material provisions of the Courts (Emergency Powers) Act, 1939 :] Two arguments were put to me by counsel for the surviving mortgagor. He submitted, first, that the present case is distinguishable from *National Provincial Bank, Ld.* v. *Liddiard* (1) because, on the true construction of the mortgage of May 5, 1937, the surviving mortgagor was under a personal liability in respect of the debt thereby secured, although that liability was limited to a sum equal to the value of the mortgaged property. Secondly, he submitted that, if his first

(1) Ante p. 158.

argument was wrong, the master made the wrong order. Counsel drew attention to the last sentence of the judgment of Farwell J. in *National Provincial Bank, Ld.* v. *Liddiard* (1), which is in the following terms: "But, so far as this particular "summons is concerned, which is a summons taken out by "the bank against Mr. Liddiard, I can do nothing more "than dismiss the summons on the ground that no leave is "necessary because the case is not one which is provided for "by the Act." In view of this sentence in Farwell J.'s judgment, counsel for the surviving mortgagor submitted that the master should have dismissed the present summons.

The first point depends entirely on the construction of the mortgage of May 5, 1937. [His Lordship stated the effect of the mortgage and read the passages relied on by counsel for the mortgagor as set out in the statement of the facts, and continued:] For my part, I can find nothing whatever in the first of these passages which can impose a personal liability on the mortgagor to pay any sum of money. As to the second passage, the portion of it which reads "although the liability of the mortgagor hereunder cannot "exceed the value of the said premises yet these presents "shall be construed and take effect as a guarantee of the "whole and every part of the principal moneys and interest "owing and to become owing as aforesaid," if divorced from its context, might well convey the impression that a personal liability was imposed on the mortgagor up to but not exceeding the value of the mortgaged property, but the provision in which this passage occurs is directed solely to limiting the mortgagor's right of proof in the bankruptcy of the principal debtor. In my view, the wording of the passage is unfortunate, but I think it is merely intended to point out that the security given is for the whole of the sum owing by the company, although the maximum loss which the mortgagor can suffer, if the security is enforced, is the value of the mortgaged property. Reading the deed as a whole, I cannot construe this passage as imposing on the mortgagor a personal liability for the payment of money. Testing the matter by

(1) Ante p. 164.

MORTON J.

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MIDLAND BANK, LD., APPLICATION BY, *In re.*

considering whether the bank could recover any sum of money in any action against the mortgagor, either before or after the security had been realized, I think it is plain that any such claim by the bank must fail.

The result is that, in my judgment, the present case cannot be distinguished from *National Provincial Bank, Ld.* v. *Liddiard* (1), and the reasoning of Farwell J. in that case leads to the conclusion that the surviving mortgagor in the present case is not the " person liable . . . . to perform the "obligation" within the meaning of s. 1, sub-s. 4, of the Act. Therefore, that sub-section gives him no protection.

In *National Provincial Bank, Ld.* v. *Liddiard* (1) Farwell J. said: " The question is whether Mr. Liddiard, who is the "respondent, is able to satisfy the court that he is a person "liable to perform the obligation against which he is seeking "this relief. 'The obligation' must mean, as it seems to me, "the obligation which arises under the mortgage which the "mortgagee is seeking to enforce. The mortgagee's only right "to take possession of the property and realize his security "is such right as he may have against the mortgagor by virtue "of his mortgage. It is, therefore, necessary, I think, to find, "in order that the matter may come within sub-section (4), "that there is an obligation on the mortgagor which he is "unable to satisfy by reason of circumstances directly or "indirectly attributable to war. In the present case, so far as "I can see, he is under no obligation whatsoever to the bank. "He is in the position that the bank have demanded payment "of the money owing by Mrs. Milburn. That does not create "an obligation on the mortgagor to pay anything. It puts "him in the position that either he must find the money "which is demanded or the mortgagees will be entitled to "realize their security. The fact that he is put in that "dilemma does not create an obligation of any kind on "him. He is under no obligation to pay the money. "If he chooses not to pay, or is unable to pay, he may find "himself in the unhappy position of having his property "taken away from him. That may be his misfortune, but

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(1) Ante p. 162.

"it does not create an obligation arising from the mortgage "into which he has entered which he has to satisfy. The "mortgage creates no such obligation whatsoever. The "position, therefore, is that the case is not one which comes "within the Act at all. It may be that it is a casus omissus. "It may be that, if the Act had intended to protect a person "in the position of the mortgagor in this matter by giving "an opportunity of getting relief under the Act, it would "have so provided. But it has not, so far as I can see, on "the language of the Act, made any such provision for this "particular case and in the circumstances it is not for me "to make a remedy by giving to the words 'perform the "'obligation' a meaning which, in my judgment, they "cannot bear. The truth of the matter is that this case "does not come within the Act at all." Here I think the learned judge was clearly referring to s. 1, sub-s. 4, of the Act. "This mortgagor is in the unfortunate position of not "being able to take the remedy which is open to him of "relieving his property by paying money which Mrs. Milburn "owes ;" I think there must have been evidence before Farwell J. that the mortgagor was unable to take this remedy by reason of his financial circumstances, but that does not clearly appear from the report. Then the learned judge continues : "but that does not create an obligation on him "to pay the money, and the fact that he cannot pay will "have the result that the bank will be entitled to exercise "their remedies by way of realizing the property. I am "unable in this case to give the respondent any relief under "the Courts (Emergency Powers) Act, 1939, not because he "has not shown sufficient cause (because I have not considered "the particular merits of the case in any way) but because "in my judgment the Act does not provide for this particular "form of case." I respectfully agree with the passage which I have just read.

I now come to counsel's second point. He says truly that the order made by the master is not that which was made by Farwell J. in *National Provincial Bank, Ld.* v. *Liddiard* (1).

(1) Ante p. 161.

In my view, however, when Farwell J. said (1) "but, so far as "this particular summons is concerned, which is a summons "taken out by the bank against Mr. Liddiard, I can do nothing "more than dismiss the summons on the ground that no leave is "necessary, because the case is not one which is provided for "by the Act," his mind was not directed to the fact that s. 1, sub-s. 2, made it obligatory on the mortgagee in that case just as in the present case, to obtain the leave of the court before realizing his security. The passages which I shall now quote show quite clearly why this point was not present to the learned judge's mind. In the first place, the statement of the facts, which is very brief, says this : "This was a summons "taken out by National Provincial Bank, Ld., against Mr. "T. E. Liddiard, asking for the leave of the court, under the "Courts (Emergency Powers) Act, 1939, to enforce a mortgage "of a house at Tunbridge Wells, mortgaged to the bank by a "mortgage dated April 1, 1935, made between the respondent "and the bank. The mortgage was given to secure moneys "which might be due to the bank, not from the mortgagor, "but from Mrs. M. B. Milburn, a daughter of the mortgagor. "The bank contended that in the circumstances no leave was "required." That, then, was the contention which was put before Farwell J., and there is a passage in the judgment which I ought to read as showing that it was that contention which he was considering. The passage is as follows (2) : "In the circumstances, the bank, being desirous of exercising "their right to possession of the property, have applied to "the court for leave under the Courts (Emergency Powers) "Act, 1939. Having applied for such leave, they now come "to the court and say that they do not in fact require any "leave in this case because the Courts (Emergency Powers) "Act, 1939, does not apply to it and that, therefore, they are "entitled to proceed to exercise their remedies without having "to obtain the leave of the court at all. The question which "arises, and I think that it is of some difficulty, is whether "that is the true view, or whether the true view is that they "have to obtain the leave of the court, in which event it will

(1) Ante p. 164.

(2) Ante p. 161

"be necessary for the court to go into all the circumstances "and see whether or not the case is one in which the mortgagees "should or should not be given leave, and on any particular "terms, to employ the remedies otherwise open to them." It is plain from these passages that before Farwell J. the case was argued on the footing that, if the mortgagor could not bring himself within the provisions of s. 1, sub-s. 4, there was no need for the mortgagee to apply for the leave of the court. I have no doubt that if the learned judge had had in mind the terms of s. 1, sub-s. 2, he would have given the leave which was sought by the summons and would not have expressed the view that no leave was necessary.

Accordingly, I think that it is right in the present case to order that the bank be at liberty to exercise any remedy which may be available to it by way of the appointment of a receiver of the property comprised in the mortgage and the realization of the security created thereby. The result is that this motion must be dismissed.

I may add that when I was in the course of considering my judgment another aspect of the matter occurred to me. Although the surviving mortgagor is not the person liable to perform the obligation within the meaning of sub-s. 4, and although he owes no debt to the bank, there is a person, namely, the company, who is liable to pay the debt and perform the obligation to secure the payment and performance whereof the mortgage was given. It seemed to me to be arguable that, if the court were satisfied that the company was unable immediately to perform the obligation by reason of circumstances directly or indirectly attributable to the present war, the court might be able to give some relief under the sub-section to the surviving mortgagor. It seems not unreasonable that a person who has mortgaged his property to secure the debt of another person should be able to say: "I tender evidence which shows that, but for the war, the "principal debtor would have performed his obligation. If "he had done so, the mortgagee would not have had recourse "to my property to obtain payment. Therefore, my present "position is one which the Act was intended to cover; and "by my evidence I have brought the case within the wording "of the sub-section; if the court is of opinion that the principal "debtor is unable to perform his obligation by reason of "circumstances directly or indirectly attributable to the "present war, relief can be given to me." It does not appear that any such argument was addressed to Farwell J., and I do not know whether any evidence of the reasons for the principal debtor's inability to pay her debt was before him. Before delivering judgment to-day I asked Mr. Guest Mathews, counsel for the bank, to deal with this argument, as the surviving mortgagor has filed evidence in the present case that the war has completely ruined the business of the L.T. Company, Ld. Mr. Guest Mathews has satisfied me, however, that the only person to whom relief can be given under the section is the person described as the person liable to perform the obligation in question.

I respectfully agree with Farwell J. that the present case is casus omissus. I think the omission to make provision for such a case as the present may cause considerable hardship, but the surviving mortgagor does not come within the wording of sub-s. 4 and I have arrived at the conclusion that the master made the right order. As a rule, when these matters are merely adjourned to the judge, the costs are directed to be added to the security. In the present case, the mortgagor did not ask for an adjournment to the judge, but launched a motion to discharge the master's order. He must pay the costs of the motion.

Motion dismissed.

Solicitors: *Page, Moore & Page; Beale & Co.*

K. R. A. H.

C. A.

1941

Mar. 27, 28; Apr. 8.

FAY *v.* MILLER, WILKINS AND COMPANY.

Vendor and purchaser—Sale by auction—Memorandum of contract—Description of vendor—Sufficiency—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 40.

Auctioneers, having knocked down real property to a bidder, signed a record of the contract which did not specify the name of the vendor. The conditions of sale provided: "The vendor will "convey as legal personal representative," and by the memorandum the purchaser acknowledged that she bought the property subject to the conditions of sale. The vendor refused to complete on the ground that the price accepted by the auctioneers was below the reserve fixed:—

Held, that the form of the memorandum was sufficient to satisfy s. 40 of the Law of Property Act, 1925, and that, in the circumstances of the case, the auctioneers were liable to the purchaser in damages for breach of an implied warranty of authority.

Decision of Bennett J. reversed.

APPEAL from Bennett J.

On July 26, 1939, Miller, Wilkins & Co., the auctioneers, put up for sale by auction on the instructions of Clara Hill, the vendor, a house which she was in a position to sell as personal representative of Agnes Atherden, deceased. The special conditions of sale reserved to the vendor the right to fix a reserve price. By clause 4 it was provided: "The vendor "will convey as legal personal representative." Mabel Fay, the purchaser, bid 600*l.* for the house and the auctioneers knocked it down to her, signed a memorandum ratifying the sale by the vendor to the purchaser for 600*l.* and accepted a deposit. By the memorandum the purchaser acknowledged that she had purchased the property "subject to the "accompanying conditions of sale." The record of the contract showed a space in which to insert the vendor's name, but no name was inserted. The vendor having refused to complete, the purchaser sued her for specific performance, adding the auctioneers as defendants and claiming against them, in the event of failure to obtain specific performance by reason of inability to establish that they had authority to sell the house for 600*l.*, damages for breach of warranty of authority.

Bennett J. held on the evidence that the auctioneers had authority to sell only to a bidder of 750*l.* or more, and refused to make an order for specific performance. He further refused to give damages against the auctioneers for breach of warranty, holding that by reason of the provisions of s. 40 of the Law of Property Act, 1925 (1), there was no enforceable contract, in that the note of the alleged contract contained nothing to identify the vendor. The purchaser appealed.

Pennycuick for the purchaser. Bennett J. was in error in holding that there was not a sufficient memorandum of the contract of purchase to satisfy s. 40 of the Law of Property Act, 1925, because the vendor was not identified. The section replaces s. 4 of the Statute of Frauds. To satisfy it the memorandum must contain all the essential terms of the contract and the parties must be so described that their identity cannot fairly be disputed: see *Rossiter* v. *Miller* (2); *Potter* v. *Driffield* (3); *Catling* v. *King* (4). Here the memorandum refers to the conditions of sale, and clause 4 of those conditions states that the vendor is conveying as a personal representative. Bennett J. relied on the fact that the description of personal representative was only contained in a condition inserted for another purpose and held that it was not sufficient that it in fact enabled the party to be traced. But this is contrary to *Catling* v. *King* (4). It is true that to secure full identification one must get the title deeds, but that is a difficulty common to all general descriptions: see Fry on Specific Performance, 6th ed., p. 162. Assuming that there was a valid contract apart from the fact that the auctioneers exceeded their authority by selling the property at less than the reserve fixed by the vendor, they are liable for breach of warranty of authority, for, by ratifying the sale, they warranted that the reserve (if any) had been reached.

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(1) By the Law of Property Act, 1925, s. 40, sub-s. 1: "No "action may be brought upon any "contract for the sale or other "disposition of land or any "interest in land, unless the "agreement upon which such "action is brought or some "memorandum or note thereof, is "in writing, and signed by the "party to be charged or by some "other person thereunto by him "lawfully authorised."

(2) (1878) 3 App. Cas. 1124.

(3) (1874) L. R. 18 Eq. 4.

(4) (1877) 5 Ch. D. 660.

Denys Buckley for the auctioneers. The terms of clause 4 implied only that the vendor's covenants for title would be limited by reference to the covenants implied on a conveyance by a personal representative. It implied nothing as to the identity of the vendor. But, even if the clause be taken to imply that the vendor was selling as legal personal representative, that is not enough. Further, the memorandum registered a conditional contract to sell only if it appeared that 600*l.* was not less than the reserve price. The fall of the hammer is only a conditional acceptance of a conditional offer, the condition being that the offer should not be less than the reserve: *McManus* v. *Fortescue* (1). The signing of the memorandum was a new transaction within the ostensible authority of the auctioneers and so binding on the vendor.

Pennycuick in reply.

Cur. adv. vult.

1941. Apr. 8. The following judgments were read:

SIR WILFRID GREENE M.R. [having stated the facts and held that the contract of agency between the vendor and the auctioneers was one under which the reserve price was to be 750*l.* :] The next question raises the point on which Bennett J. rejected the purchaser's claim against the auctioneers. He held that there was no note or memorandum of the contract of purchase sufficient to satisfy s. 40 of the Law of Property Act, 1925, with the result that the purchaser could not show any damage arising from the auctioneer's breach of warranty of authority which the learned judge appears to have thought was in other respects established.

The alleged defect in the memorandum is the absence of words sufficient to lead to the identification of the vendor. The only words relied on for this purpose are those in clause 4 of the special conditions of sale: "The vendor will convey as personal "representative." Bennett J. held that these words were insufficient on the ground that they were inserted, not with the intention of identifying the vendor, but for the purpose of the conveyance. With all respect to the learned judge, this is, in my opinion, too narrow a view. The question is not what the intention was, with which the words were used, but what on a fair construction they mean. If they are sufficient to lead the inquirer to the actual vendor, that is enough, even though, as in the case of the word "proprietor," considerable research may be required. The words appear to me to mean, in the first place, that in the conveyance the vendor will convey, and will be expressed to convey, as personal representative of the deceased person so as to bring into effect the provisions of s. 76, sub-s. (1) (F), of the Law of Property Act, 1925, which limit the vendor's covenants for title. This necessarily means that at the date of the conveyance the vendor will be a person who can properly be described therein as the personal representative of a deceased person and that he will convey the property sold under that description and in that capacity.

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(1) [1907] 2 K. B. 1.

It was argued by Mr. Buckley that the language of special condition 4 implied nothing more than that the vendor's covenants for title would be limited by reference to the covenants implied on a conveyance by a personal representative and was merely a convenient form of shorthand implying nothing as to the character of the grantor. I cannot accept this argument. There is a well known conveyancing device for achieving the result which he suggests (see Key & Elphinstone, 13th ed., vol. i., p. 571, precedent No. 8). Such a device is necessary because the limited statutory covenants for title are only imported when the grantor both conveys in the capacity of personal representative and is expressed to convey as such.

But this does not dispose of the other argument, namely, that special condition 4 only describes the character which the vendor will have at the date of the conveyance and affords no sufficient clue to his identity at the date of the contract. I do not so regard it. It appears to me that, if the vendor at the date of the conveyance will be the personal representative of a deceased owner, it follows naturally that he must occupy that

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position at the date of the contract. Any other interpretation would involve the assumption of possibilities too remote to be regarded.

I construe the condition, therefore, as implying that the vendor is selling as legal personal representative of a deceased person. Mr. Buckley argued that even this would not be enough. It is, no doubt, difficult to state any logical rule to explain the decisions on the question what words are sufficient to identify the vendor and I do not propose to embark on any such inquiry. I content myself with observing that in the second edition of Fry on Specific Performance, published in 1881, there is quoted with the approval of the learned author a dictum of Lord Romilly to the effect that it is sufficient if the vendor is described as mortgagee, executor or trustee (p. 148, para. 331). This paragraph has appeared in all subsequent editions and the practice of conveyancers must for many years have been based on it as a correct statement of the law. It would not be right to disturb a practice so long-standing and I must decline to do so, particularly as it receives confirmation in the decision of this Court in *Catling* v. *King* (1). It is right to say that the passage in Fry was not before Bennett J.

The next point taken by Mr. Buckley was based on the decision of this Court in *McManus* v. *Fortescue* (2). In that case the conditions stated that there was a reserve price and the defendant auctioneers had knocked the property down to the plaintiff at a lower price. It was held that the fall of the hammer was only a conditional acceptance of a conditional offer, the condition being that the offer should be not less than the reserve price. In the present case, however, a memorandum was actually signed by the auctioneers and it is impossible to treat the condition as applying after that was done. This is not affected by the words in the memorandum by which the purchaser acknowledges that she has purchased the property "subject to the accompanying conditions of sale." These words cannot include a condition the operation of which is in its nature confined to the period before a memorandum is signed. The auctioneers are expressed to "ratify" the sale

(1) 5 Ch. D. 660. (2) (1907) 2 K. B. 1.

and this is quite inconsistent with the view that the condition was regarded as remaining in force at that stage.

Mr. Buckley then argued that the signing of the memorandum was a new transaction within the ostensible authority of the auctioneers. This proposition, when analysed, means nothing more than that the auctioneers had ostensible authority to make representations as to the extent of their own authority and I cannot accept it. Lastly, Mr. Buckley maintained that as the conditions only empowered the vendor to fix a reserve price and the purchaser did not know that a reserve price had been fixed, she was entitled to assume that there was no reserve. The short answer to this is that, as I have already said, the purchaser was put on inquiry, and, if she chose to bid without knowing whether or not there was a reserve price, the risk was hers and she could not hold the vendor bound if in fact there was a reserve price which exceeded the amount of her bid.

I cannot, therefore, accept any of the arguments which seek to show that the contract was binding on the vendor. It follows, admittedly, that the auctioneers are liable to the purchaser for damages for breach of an implied warranty of authority and this appeal must, accordingly, be allowed. The order will be in accordance with the judgment of Clauson L.J.

CLAUSON L.J. [having stated the facts :] It was not disputed before us that, if this objection based on s. 40 of the Act must be upheld, the judge was right in dismissing the action as against the auctioneers.

The first question which falls for decision is whether the judge decided correctly on the question of the insufficiency of the contract. It is well settled that, if the vendor's name does not appear on the face of the contract, the contract will not suffer from insufficiency on that score if the contract indicates the vendor by a description sufficient to preclude any fair dispute as to identity. It has been held that "proprietors" or "owners" is sufficient description : *Rossiter* v. *Miller* (1) (per Lord Cairns L.C.) ; and so also is "executor" or "trustees": *Hood* v. *Lord Barrington* (1) (per Lord Romilly M.R.); or "trustees for sale": *Catling* v. *King* (2) (per Jessel M.R. and James and Mellish L.JJ.). In my judgment, a description of the vendor as legal representative must, in view of those long standing authorities, be held sufficient if such a description is to be found in the note or in the conditions or particulars embodied by reference in the note. In the present case the memorandum embodies the conditions, and in them appears this clause: "The vendor will convey as personal "representative." It was decided by the learned judge and strenuously argued before us that this clause did not amount to a description of the vendor as legal representative. It was argued that the clause had reference only to the form of the conveyance and was not, nor was it intended to be, a description of the vendor, and that the clause merely stated that the vendor, whoever he was, would not give any covenants for title save those which would be implied under s. 76, sub-s. 1 (F) of the Law of Property Act, 1925, by his being expressed to convey as personal representative. It must, however, be borne in mind that the implication of covenants by a conveyance expressed in that form is effected only if the conveying party is not only expressed so to convey, but in fact does convey as personal representative. This consideration seems to lead inevitably to the conclusion that this clause indicates to the reader that the vendor is a personal representative, and, if once that conclusion is reached, it seems to me to follow that the requirements of the section as to the vendor's description must be held, on the strength of the authorities which I have mentioned, to be satisfied.

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(1) (1878) 3 App. Cas. 1124, 1140.

I am, accordingly, unable to agree that, by reason of s. 40, the contract was unenforceable. It is, however, open to the auctioneers to support the correctness of the dismissal of the action on any other ground, and they strenuously argued that the dismissal was justified by the fact that they had, or must be taken to have had, authority to sell for less than 750*l*. Their counsel asked us to hold, first, that on the evidence no reserve was ever fixed by the vendor; secondly, assuming this

(1) (1868) L. R. 6 Eq. 218.

(2) 5 Ch. D. 660.

contention to be untenable, that the memorandum registered nothing more than a conditional contract to sell if, and only if, it turned out that 600*l*. was not less than the reserve ; and, thirdly, that, in any view of the matter, a sale by the auctioneers at 600*l*., or, indeed, any other price, was within their ostensible authority, and, therefore, binding on the vendor. [His lordship having held that the authority of the auctioneers was limited to a sale at 750*l*. or more, continued :] That seems to me to be the end of the case, for the contention that the memorandum recorded merely a conditional contract —conditional on the figure of 600*l*. being found to be not less than the reserve—appears to me quite untenable. The contract is a clear contract for a sale for 600*l*., and, when read with the conditions, it appears to imply that the reserve, if any, is not greater than 600*l*.

The only remaining point involves the proposition that the auctioneers, by being authorized to sell by auction, were impliedly authorized to sell without regard to the wishes of the vendor as to the minimum price. No authority for this proposition was cited, and it appears to me to be contrary to principle. A plaintiff who is suing an alleged principal on a contract made by an agent is bound to prove either that the agent was in fact authorized by the principal to make the contract on the principal's behalf, or that on the facts the principal is estopped from setting up want of authority by the agent. Where the conditions of sale disclose (in the clause which reserves to the principal the right to fix a reserve) that the principal reserves the right to limit the agent's authority to a sale at or above an undisclosed figure, the purchaser takes on himself the risk that the auctioneer, in selling at the price named in the note, is exceeding his authority, and relies in practice on the care and honesty of the auctioneer as a professional man, and in law on his (the purchaser's) right to sue the auctioneer on the warranty of authority implied in the fact of his selling on his principal's behalf at the figure named in the note.

In the result, I see no answer to the purchaser's claim for damages against the auctioneers for breach of warranty of authority, and it follows that, in my judgment, the learned judge's dismissal of the purchaser's action against the auctioneers must be reversed, and the purchaser must be declared entitled to recover against the auctioneers damages for breach of warranty of authority, and an inquiry as to such damages must be directed. The auctioneers must pay the costs of the purchaser of the action in so far as they relate to her claim against the auctioneers, and also the purchaser's costs of this appeal. On the inquiry the costs incurred by the purchaser in the action so far as they relate to her claim against the vendor and the costs she has become liable to pay to the vendor will form part of the damages. The costs of the inquiry as to damages will be reserved.

du PARCQ L.J. I have had the advantage of reading the judgments of the Master of the Rolls and Clauson L.J. I am in agreement with them and have nothing to add.

Appeal allowed.

Solicitors: *Pinsent & Co., for F. B. Jevons & Riley, Tonbridge; Davidson & Co.*

F. C.

In re HUTLEY'S LEGAL CHARGE.

BARNES *v.* HUTLEY.

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Apr. 29, 30.

Emergency legislation—Mortgage—Agricultural land—Loan to farmer by Public Works Loan Commissioners—Default by borrower—Claim to possession—Requisition of mortgaged property by Army—Requisition abandoned—Entry by local agricultural committee—Compensation for requisition or entry—Vesting in commissioners—Public Works Loans Act, 1875 (38 *&* 39 *Vict. c.* 89), *ss.* 9, 18, 22, *sub-s.* 1*; s.* 33*—Agricultural Credits Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 34), *s.* 1, *sub-s.* 1*—Courts* (*Emergency Powers*) *Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2*—Compensation* (*Defence*) *Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 75), *s.* 2, *sub-s.* 1 (*a*)*—Possession of Mortgaged Land* (*Emergency Provisions*) *Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 108), *s.* 1, *sub-s.* 1.

By a legal charge of agricultural land dated June 5, 1928, and executed by a farmer to secure a loan to him by the Public Works Loan Commissioners under the Agricultural Credits Act, 1923, and s. 9 of the Public Works Loans Act, 1875, the secretary to the commissioners was empowered to sell the property charged on default by the borrower in payment of interest or an instalment of principal, and to enter without notice when the power arose. On November 27, 1939, the borrower received notice from the military authorities that all the property charged save a specified part was to be requisitioned for military purposes, but on March 26, 1940, he was informed by the military authorities that the requisition had been abandoned. In July, 1940, the local agricultural committee appointed by the Minister of Agriculture and Fisheries to exercise compulsory powers of entry and cultivation vested in him by the Defence (General) Regulations, 1939, took possession of the property, save the farmhouse and the specified part. Between November 27, 1939, and January 2, 1940, and on June 5, 1940, the borrower defaulted in the payment of instalments of principal and interest:—

Held, that, subject to the rights of the Secretary of State for War, the Minister of Agriculture, and the local agricultural committee, the commissioners were entitled to take possession of the property without the leave of the court under the Courts (Emergency Powers) Act, 1939, and the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, since the debt owed by the borrower was a debt due to the Crown and the Crown was not bound by either of those Acts.

Attorney-General v. *Hancock* [1940] 1 K. B. 427, followed. *Attorney-General of the Duchy of Lancaster* v. *Moresby* [1919] W. N. 69, not followed. *Irish Land Commission* v. *O'Neill* [1915] 2 Ir. 66, considered:—

Held, further, that the right to receive compensation under the Compensation (Defence) Act, 1939 (if any), for the requisition

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or taking possession of the land was a right, interest, or privilege vested in the borrower within the meaning of s. 22, sub-s. 1, of the Public Works Loans Act, 1875, which, under that sub-section, became vested in the secretary of the commissioners on their taking possession of the mortgaged property.

ADJOURNED SUMMONS.

The following statement of the facts is taken from the judgment. By a legal charge, dated June 5, 1928, made between Ralph Hutley, the first defendant, of the one part, and Henry George Herbert Barnes, the plaintiff, the secretary of the Public Works Loans Commissioners (by whom, under s. 5, sub-s. 1, of the Public Works Loans Act, 1875, the commissioners might sue and be sued (1)), of the other part, it was recited that under s. 1, sub-s. 1, of the Agricultural Credits Act, 1923, the commissioners might lend certain sums on mortgage of agricultural land (1); that the first defendant [referred to in the charge as "the borrower"] was seized of the property referred to in the schedule to the charge in fee simple in possession free from incumbrances; that the borrower had agreed to purchase the property not earlier than April 5, 1917, or later than June 27, 1921, and that the property was wholly or mainly agricultural land (these recitals being directed to showing that the transaction was authorized by the Act); that the borrower had applied to the Loan Commissioners for an advance of 5625*l.* on the security of the property; and that the Loan Commissioners had resolved to make that advance "upon having the repayment thereof "with interest at the rate of 5*l.* per centum per annum (here-"inafter called 'the mortgage rate') secured in manner "hereinafter appearing," and had delivered to the borrower or to his order a certificate in respect of which the borrower was entitled to receive the loan from the Commissioners for the Reduction of the National Debt. In the operative part of the deed, cl. 1 provided: "The borrower hereby covenants "with the secretary as follows: (1.) To repay on December 5 "next to the cashiers of the Bank of England at their principal "office (to the use of His Majesty his heirs and successors) the

(1) See appendix, post p. 382.

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"said loan with interest thereon at the mortgage rate (such "interest to be computed from the day mentioned for such "purpose at the foot of the said certificate)." A proviso provided for payment of interest "to the said cashiers at the "office aforesaid (to the use aforesaid)"by half-yearly payments on December 5 and June 5 in every year. In cl. 2 there was a charge by way of legal mortgage of the property described in the schedule "with the payment of all principal money and "interest and other money hereby covenanted to be paid in "accordance with the covenants by the borrower herein "contained." By cl. 3: "(i.) For the purposes of this deed "the legal right of redemption hereunder shall be deemed to "cease on December 5, 1928. (ii.) The benefit of all charges "herein contained and the right to enforce and exercise all "remedies securities and powers hereby conferred or arising "hereunder shall be vested in the secretary." In cl. 4, sub-cl. (i.), a proviso for redemption provided for payment of the money to the Bank of England " to the use aforesaid," the payments provided for in the clause being payments of interest together with instalments of principal. It was provided that if these payments are made " then and in that case "the borrower shall not be required to repay the said loan "or any part thereof otherwise than by means of the said "half-yearly instalments and final payment mentioned in this "clause. Provided always that if any power of sale affecting "the scheduled property whether conferred by this deed or "otherwise shall at any time hereafter become exercisable "then and in such case the whole of the said loan for the time "being remaining unpaid shall (upon a demand in writing "being delivered or sent by post to the borrower or left upon "the scheduled property) forthwith become due and payable "from and by the borrower to the said cashiers at the office "aforesaid (to the use aforesaid) and together with any "instalments and money then in arrear shall be recoverable "by the secretary with interest at the mortgage rate by "action against the borrower or by exercise and enforcement "of any of the powers and remedies of the secretary in that "behalf." It was provided further: " (ii.) The borrower

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"shall not be entitled to repay the said loan or any part thereof "otherwise than by means of such half-yearly instalments "and final payment as aforesaid. (iii.) Notwithstanding the "provisions of this clause but without prejudice to the same "the principal money hereby secured shall be deemed to "become due within the meaning of the Law of Property "Act, 1925, and for all the purposes of that Act on the day "on which the same is hereinbefore covenanted to be paid." By cl. 6: "The secretary may at any time after the "execution of this deed sell the scheduled property or any "part thereof or appoint a receiver of the income of the "scheduled property or any part thereof in like manner as if "the statutory power of sale or appointment of a receiver "under the said Public Works Loans Act, 1875, or the Law "of Property Act, 1925, had respectively arisen." By cl. 7: "The secretary shall not exercise the power of sale or appointment of a receiver hereinbefore contained unless and until "the happening of any or either of the events following, "that is to say: (I.) some instalment of principal money and "interest or some part thereof shall have been unpaid for "fourteen days after the day hereby appointed for payment "thereof. . . ." By cl. 10: "(i.) The borrower hereby "attorns and becomes tenant from year to year to the "secretary of such part or parts of the scheduled property "as are in the occupation of the borrower at the yearly rent "of ten shillings (to be accepted towards payment of "interest). (ii.) Provided always that the secretary may "at any time after the power of sale hereby conferred has "become exercisable without giving any previous notice to "quit enter into and upon and take possession of the premises "whereof the borrower has attorned tenant as aforesaid and "determine the tenancy created by such attornment." By cl. 15: "(i.) This deed is a recognised mortgage within the "meaning of the [Agricultural Credits Act, 1923], and is in "the form prescribed by the Loan Commissioners and shall "have effect accordingly under the said Public Works Loans "Act, 1875. (ii.) The Loan Commissioners have and shall "have with regard to the said loan and this security all the "powers which are by the last mentioned Act given to them "for recovery of loans and nothing in this deed contained "shall in any way restrict the exercise by the Loan Com-"missioners or the secretary of any of those powers or "any of the powers conferred on mortgagees by the Law of "Property Act, 1925, as well as any of the powers herein "contained."

The property charged was, in all, about 837 acres and it comprised a farm, dwelling-house, garden and domestic buildings, farm buildings, about 189 acres of land known as "the Saltings," and about 337 acres of pasture, arable and woodland. On November 27, 1939, a notice was served on the first defendant, by order of the Secretary of State for War authorizing the use of the mortgaged premises, except, apparently, the Saltings, for military purposes. On January 2, 1940, the adjutant of a battalion of a certain regiment wrote to the first defendant: " To Mr. Hutley. Dear Sir, Further "to your visit of this morning, we have now forwarded letter "to the East Anglian Institute of Agriculture, Chelmsford, "informing them that Little Oakley Hall Farm has been "requisitioned for military training, by order of the Secretary "of State for War." Shortly before that letter was written, but after he had had the notice on November 27, 1939, the first defendant made default in payment of certain interest and an instalment of principal. On March 26, 1940, the colonel of a battalion of a certain regiment wrote to the first defendant: " Dear Sir, I have now heard from the Ministry "of Agriculture and Fisheries that the authorities have "decided not to go on with the requisitioning of your farm. "You can therefore consider all requisition notices served on "you as cancelled, and you should therefore comply with any "ploughing-up orders that have been served upon you. I "regret any inconvenience that may have been caused to "you . . . ." On June 5, 1940, the first defendant again made default in payment of an instalment of principal and interest. On July 27, 1940, the Essex War Agricultural Executive committee, with the consent of the Minister of Agriculture and Fisheries, took possession of the mortgaged premises except the farm house and the Saltings, under the Defence (General) Regulations, 1939, which were made under the Emergency Powers (Defence) Act, 1939, and, according to the evidence of the first defendant, the committee were still in occupation of, and were cultivating, the property.

By this summons, the plaintiff asked (inter alia) (1.) whether he was entitled to take possession of the property comprised in the legal charge, subject to the rights, if any, of the Secretary of State for War, the Minister of Agriculture and Fisheries, or the Essex Agricultural Committee, despite the provisions of the Courts (Emergency Powers) Act, 1939, and the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, (1), or only with the leave of the Court under those Acts ; and (2.) whether the whole, or any, and, if the latter, what part, of any compensation moneys payable to the first defendant by the Secretary of State for War, the Minister of Agriculture and Fisheries, or the Essex Agricultural Committee, under the Compensation (Defence) Act, 1939, and in particular under s. 2, sub-s. 1 (*c*), thereof (1), was comprised in the security created by the legal charge. Barclays Bank, Ld., was joined as a defendant to the summons, the first defendant having executed an agricultural charge in favour of the bank on July 4, 1938.

Myles (*H. E. Salt* with him) for the plaintiff. The plaintiff can take possession of the property, subject to the rights (if any) mentioned in the first question, despite the provisions of the Courts (Emergency Powers) Act, 1939, and the Possession of Mortgaged Land (Emergency Provisions) Act, 1939 (1), for the Crown is not bound by either of these Acts, and the debt under the legal charge is a debt owed to the Crown. For the purposes of this case, the Loan Commissioners are the Crown. An Act binds the Crown only if the Crown is mentioned in it specifically, or is brought within the Act by necessary implication from the language of the Act. In *Attorney-General* v. *Hancock* (2) Wrottesley J. discussed all the authorities, and that case really covers the present case. If *Attorney-General*

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(1) See appendix, post p. 382.

(2) [1940] 1 K. B. 427.

of the Duchy of Lancaster v. *Moresby* (1) stood alone, the plaintiff might be in a much more difficult position, but Wrottesley J. said that he did not agree with it: *Attorney-General* v. *Hancock* (2) should be followed. The debt secured by the legal charge is clearly a debt due to the Crown. [He referred also to s. 1, sub-ss. 1 and 2, of the Agricultural Credits Act, 1923; ss. 4, 8, 9, 18, 30, 50 and 51 of the Public Works Loans Act, 1875 (3).] The money available for making this particular loan comes under the Public Works Loans Act, 1927. The National Debt Commissioners have funds available out of which to find the moneys authorized from year to year. That Act, as well as s. 33 of the Act of 1875, makes it clear that the debt in the present case is a Crown debt.

Melford Stevenson for the first defendant. In view of *Attorney-General* v. *Hancock* (2) it cannot be contended that the Crown is bound by the Courts (Emergency Powers) Act, 1939, and the possession of Mortgaged Land (Emergency Provisions) Act, 1939 (3). There is, however, room for discussion whether this debt is a debt due to the Crown. A question very closely comparable with that which the Court has now to decide was discussed in *Irish Land Commission* v. *O'Neill* (4) where it was held that a purchase annuity payable to the Irish Land Commission under the Irish Land Act, 1903, was a Crown debt. That authority at first sight makes it difficult to establish the contention that the debt secured by the legal charge in the present case is not a Crown debt. Further difficulties are raised by the various phrases in the Public Works Loans Act, 1875, especially by s. 18, and by the provision, as in s. 33, that every sum payable under any security made in pursuance of the Act may be recovered as a specialty debt due to the Crown.(3) It is, however, possible to regard its recovery as a specialty debt due to the Crown as procedural and nothing else, and to contend that a statutory prescription of the procedure for its recovery does not make it a debt due to the Crown. That contention is given force by the fact that the Act of Henry VIII.,

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(1) [1919] W. N. 69.

(2) [1940] 1 K. B. 427, 437, 438.

(3) See appendix, post p. 382.

(4) [1915] 2 I. R. 66, 69.

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to which the section refers, is almost entirely procedural. Moreover, the scheme of the Public Works Loans Act, 1875, is to create a body of Commissioners, who are themselves distinct from the Crown, and who have certain duties imposed on them and certain rights given to them.

R. W. Goff for the bank.

MORTON J. [after stating the facts as set out above, reading the material recitals and clauses of the charge, and saying that it was to be observed that, by cl. 1, the loan was repayable "to the use of His Majesty his heirs and successors":] I turn now to the question of law whether the Courts (Emergency Powers) Act, 1939, binds the Crown. [His Lordship read s. 1, sub-ss. 1 and 2, of the Act (1), and continued:] The Crown is nowhere expressly mentioned in the statute, and, but for a decision of Rowlatt J. to which I shall shortly refer, I should feel no hesitation in holding that the Act did not bind the Crown, having regard to the well known rule that, if an Act of Parliament would divest the Crown of its property, rights, interests or prerogative, it is not to be construed as applying to the Crown unless the Crown is mentioned either expressly or by necessary implication. The matter was considered by Wrottesley J. in *Attorney-General* v. *Hancock* (2). The debt in that case consisted of arrears of income tax which the Crown sought to recover and Wrottesley J. decided that the Courts (Emergency Powers) Act, 1939, did not bind the Crown. With that decision I entirely and respectfully agree, and, as the authorities were very fully dealt with by Wrottesley J., I do not propose again to cover the ground. I would observe, however, that Wrottesley J. distinguished the decision of Rowlatt J. in *Attorney-General of the Duchy of Lancaster* v. *Moresby* (3) from the case before him. He dealt with the matter in these words (4) "In *Attorney-General of the Duchy of* "*Lancaster* v. *Moresby* (3), therefore, Rowlatt J. decided that "s. 1, sub-s. 2, of [the Courts (Emergency Powers) Act, 1917] "applied to the Crown in the sense that it applied to a contract

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(1) See appendix, post p. 382.
(2) [1940] 1 K. B. 427.
(3) [1919] W. N. 69.
(4) [1940] 1 K. B. 427, 437.

"to which the Crown was a party, but no one has ever decided "that the Courts (Emergency Powers) Act, 1914, affected the "Crown so as in any way to diminish its right to recover taxes. "On that ground alone, the decision of Rowlatt J. in *Attorney-"General of the Duchy of Lancaster* v. *Moresby* (1) is distinguish-"able from the present case. There are other difficulties in "*Attorney-General of the Duchy of Lancaster* v. *Moresby* (1). To "begin with, it did not deal with a debt due to the Crown at "all, but with costs. I cannot say that I agree with it if it "purports to decide, quite apart from difficulties of procedure, "that a subject could rely upon s. 1 of the Act of 1917 to "suspend or annul a contract with the Crown. The present "case, however, is not one of a contract with the Crown. "It is a case of a debt due to the Crown, not under contract "but by way of tax." Assuming that the debt with which I have to deal in the present case is a debt due to the Crown, it is so due under a contract, and I find it impossible to draw any real distinction between the decision of Rowlatt J. in *Attorney-General of the Duchy of Lancaster* v. *Moresby* (1) and the present case. It is true that Rowlatt J. was dealing with another statute, but I do not think it would be right for me on that ground to draw a distinction which does not seem to me to be a real one. On the other hand, it is manifest, from the passage which I have read from *Attorney-General* v. *Hancock* (2) that Wrottesley J. took the view that the Courts (Emergency Powers) Act, 1939, did not bind the Crown in the case of a debt due by contract, although in fact the case before him was a debt due by way of tax. Having regard to the views expressed by Wrottesley J. in *Attorney-General* v. *Hancock* (2), I do not regard myself as bound to accept the view taken by Rowlatt J. in 1919. Further, the arguments addressed to Rowlatt J. are not set out in the Weekly Notes, so that I do not know what was or was not brought to the attention of Rowlatt J. and his reasoning in arriving at the conclusion that the Crown was bound by the Courts (Emergency Powers) Act, 1917, is set out very briefly. In these circumstances I have come to the conclusion that, notwithstanding

(1) [1919] W. N. 69.

(2) [1940] 1 K. B. 427, 437.

the decision in *Attorney-General of the Duchy of Lancaster* v. *Moresby* (1), I ought to hold, and I do hold, that the Courts (Emergency Powers) Act, 1939, does not bind the Crown in the present case.

I must now consider the Possession of Mortgaged Land (Emergency Provisions) Act, 1939. [His Lordship read s. 1, sub-ss. 1 and 2, of the Act (2), and continued:] It appears to me on the facts that this Act would not constitute a barrier to the plaintiff in the present proceedings, even if the Crown were bound by the Act, because there has been default in payment of principal and interest and the mortgage money is repayable by instalments, but, in my view, there is no more reason for thinking that the Act which I am now considering binds the Crown than there is reason for thinking that the Courts (Emergency Powers) Act, 1939, does so. In neither Act is the Crown expressly mentioned, and I cannot see that in either is the Crown mentioned by necessary implication.

I now turn to the second question, namely, whether the debt secured by this legal charge is a debt owed to the Crown. [His Lordship read s. 1, sub-ss. 1 and 2, of the Agricultural Credits Act, 1923, and s. 4, s. 5, sub-s. 1, and ss. 7, 8, 9, 18, 20, 32, 33, 50 and 51 of the Public Works Loans Act, 1875 (2), and continued:] Having regard to these provisions, and, in particular, to ss. 18, 33 and 50 of the Act of 1875, I feel that I must come to the conclusion that the debt secured by the mortgage of 1928 is a debt owed to the Crown. I am assisted in so doing by *Irish Land Commission* v. *O'Neill* (3), but even without that assistance I should have formed the same view on the wording of the statutes to which I have referred. Accordingly, I make a declaration that, having regard to the provisions of the Public Works Loans Act, 1875, and the Agricultural Credits Act, 1923, and to the true construction of the legal charge, the plaintiff, as secretary of the Loan Commissioners, is entitled to take possession of the property comprised in the legal charge (subject to the rights, if any, of His Majesty's Secretary of State for War and of His Majesty's Minister of Agriculture and Fisheries, or of the Essex Agricultural Committee) notwithstanding the provisions of the Courts (Emergency Powers) Act, 1939, and of the Possession of Mortgaged Land (Emergency Provisions) Act, 1939.

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(1) [1919] W. N. 69.

(2) See appendix, post p. 382.

(3) [1915] 2 I. R. 66.

The Court then heard argument on the question whether all, or any, and, if the latter, what part, of compensation moneys payable under the Compensation (Defence) Act, 1939 (1), by the Secretary of State for War, the Minister of Agriculture and Fisheries, or the Essex Agricultural Committee were comprised in the security created by the legal charge.

Myles for the plaintiff. Any compensation payable in respect of the matters mentioned in s. 2, sub-s. 1 (*a*), of the Compensation (Defence) Act, 1939, is payable to the plaintiff. That is clear from s. 22, sub-s. 1, of the Public Works Loans Act, 1875, for the right to receive that compensation (assuming that, but for s. 22 it would be payable to the first defendant) is a right, interest or privilege for the time being vested in the first defendant within the meaning of s. 22, sub-s. 1. The words of s. 22, sub-s. 1, are extremely wide, and cover almost everything that would be payable if the plaintiff went into possession, as, in view of the Court's decision on the first question on the summons, he is about to do. [He referred to s. 17 of the Compensation (Defence) Act, 1939.] The moment he goes into possession he is the person entitled to occupy the land, and he is also then entitled to arrears of rent: *In re Ind, Coope & Co.* (2). It is true that, just as was done in that case, the plaintiff has allowed the first defendant to remain in possession: but he is none the less entitled to go into possession.

Melford Stevenson for the first defendant. The argument for the plaintiff puts on s. 22, sub-s. 1, a construction which it does not bear. What exists in the present case is a right of compensation comparable to a right to damages, and the mode of assessing it, as set out in the Act, is by regarding it as if it were rent. The two phrases "in relation to the

(1) See appendix, post p. 382.

(2) [1911] 2 Ch. 223, 230.

MORTON J.

1941

HUTLEY'S LEGAL CHARGE, *In re.* BARNES *v.* HUTLEY.

"property" and "necessary for carrying on and managing "the same" are clearly intended to have a limiting effect. The mere fact that the plaintiff can take possession at any moment does not make him a person entitled to occupy the land. The reference in s. 2, sub-s. 1 (*a*), of the Compensation (Defence) Act, 1939, to "a sum equal to the rent which might "reasonably be expected to be payable by a tenant in "occupation of the land . . . ." is no more than an indication of a mode of assessment.

R. W. Goff for the bank. In s. 2, sub-s. 1 (*a*), compensation is made payable to the person entitled to occupy the land. Under para. (*c*) it is made payable to the person who is in effect the occupier.

MORTON J. When this question was first mentioned to me I was inclined to think that it would not be right to decide it, because counsel asks me to decide in advance what will be the rights of the plaintiff when he has gone into possession of the mortgaged property, or such part of it as is not occupied by the Essex Agricultural Committee. Further, as no sum has yet been allocated as compensation under any particular head of s. 2 of the Compensation (Defence) Act, 1939 (1), it would seem that any decision would have to be based on the assumption that some part of the compensation will be allocated to some particular head of the section. However, Mr. Myles informs me that, in view of my decision on para. 1 of the summons, his client intends to go into possession forthwith, subject as mentioned in that paragraph, and I am prepared to decide the matter on the footing that the order which I make will not be drawn up until this Court has been satisfied by evidence that the plaintiff has gone into possession. With regard to the other difficulty, it appears that after the issue of the summons the Minister of Agriculture authorized a sum of 20*l.* to be paid by the Essex Agricultural Committee on account of compensation due under the Compensation (Defence) Act, 1939 (1). That sum is now held by a third party pending a decision as to who is entitled to compensation under the Act, but no part of it has been allocated to any particular head of compensation. It appears to be reasonably clear, however, that some part of the 20*l.* will be payable under s. 2, sub-s. 1 (*a*), of the Act (1), and, that being so, I am willing, to assist the parties in these difficult times, to decide the question on the footing that the plaintiff has gone into possession and that compensation will be payable in respect of the matters mentioned in that provision.

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(1) See appendix, post p. 382.

Mr. Myles submits that any compensation so payable is payable to the plaintiff, and he founds his argument, first, on ss. 21 and 22 of the Public Works Loans Act of 1875. [His Lordship read ss. 21 and 22 of the Act of 1875, and s. 1, sub-s. 1, s. 2, sub-ss. 1 and 2, and s. 17 of the Compensation (Defence) Act, 1939 (1), and continued :] It is to be observed that, although the sum payable as compensation is to be equal to the rent which might reasonably be expected to be payable by a tenant in occupation, and although it is to be deemed to be rent for the purposes of the enactments relating to income tax and land tax, the payment is, in fact, not rent, but compensation payable under the Act, and the person to whom it is payable is defined in s. 2, sub-s. 2, as being the person who for the time being would be entitled to occupy the land but for the fact that possession thereof is retained under the exercise of emergency powers. Mr. Myles suggests that the right to receive this compensation (assuming that, but for s. 22 of the Public Works Loans Act, 1875, it would be payable to the first defendant), is a right, interest, or privilege for the time being vested in the first defendant in relation to the property, within the meaning of s. 22, sub-s. 1, and, accordingly, on the plaintiff going into possession of the mortgaged property, that right, interest, or privilege, becomes vested in the plaintiff as secretary of the Commissioners.

In my view, that contention is well founded. The words of s. 22, sub-s. 1, are extremely wide, and to my mind this right to compensation in respect of being dispossessed of the property is a right, interest, or privilege in relation to the property. Thus, it seems to me that Mr. Melford Stevenson, for the first defendant, is on the horns of a dilemma. If, but for s. 22 of the Public Works Loans Act, 1875, this compensation would be payable to his client, it is taken from his client and given to the plaintiff by s. 22 of that Act. On the other hand, if, on the true construction of the Compensation (Defence) Act, 1939, the plaintiff as mortgagee having a right to possession, is the person who "would be "entitled to occupy the land," then again this compensation is payable to the plaintiff. Having regard to the view which I take upon the construction of s. 22 of the Public Works Loans Act, 1875, it is unnecessary for me to consider the further argument put before me by Mr. Myles, which is based on the principles laid down in the case of *In re Ind, Coope & Co., Ld.* (1).

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(1) See appendix, post p. 382.

For those reasons, on the footing that the plaintiff has already gone into possession, I propose to declare that the right to receive compensation, if any, payable by the Secretary for War, or by the Minister of Agriculture, or by the Essex Agricultural Committee under s. 2, sub-s. 1 (*a*), of the Compensation (Defence) Act, 1939, is vested in the plaintiff as secretary of the Commissioners.

Solicitors: *J. Conway Morris; E. F. Iwi, for Steed & Steed, Long Melford, etc., Suffolk; J. R. Welch, Son & Algar, for Turner, Martin & Symes, Ipswich.*

(1) [1911] 2 Ch. 223.

K. R. A H.

APPENDIX.

By s. 5, sub-s. 1, of the Public Works Loans Act, 1875, the Public Works Loans Commissioners may sue and be sued by their secretary.

Sect. 7: " . . . . Where the secretary of the Loan Commissioners "is a party to any action, suit, or other legal proceeding, such secretary "acting under the direction of the commissioners shall be deemed to "represent the Crown, so far as regards the interest of the Crown in "any loan granted under this Act or any money due under a security "for any such loan, and it shall not be necessary to make the Crown "or any other person on behalf of the Crown a party to such action, "suit, or proceeding, in respect of such interest as aforesaid."

Sect. 8: "All conveyances, leases, mortgages, releases, arrangements, "and things which the Loan Commissioners are authorised by this "Act to grant, execute, make or concur in, and all powers, acts, and "things which the Loan Commissioners are authorised by this Act "to exercise, do, or concur in, in relation to any mortgaged property "or rate, may be granted, executed, made, concurred in, exercised, "and done by their secretary for the time being under their direction, ..."

Sect. 9: "The Loan Commissioners may, if they think it expedient, "from time to time, in manner mentioned in this Act, make loans "for the purpose of any of the works mentioned in the first schedule "to this Act, to any person having power under an Act of Parliament "or otherwise to borrow for such purpose . . . ."

Sect. 18: "Where a loan is granted by the Loan Commissioners "on the security of a mortgage of any property (whether with or "without any other security), the property from and after the date of "the mortgage shall be charged with the payment to the use of Her "Majesty of the loan with interest as in the mortgage mentioned, "in priority, save so far as otherwise specified in the mortgage, over "every other debt, mortgage, or charge whatsoever affecting the "property, except any loan due to any creditor not assenting to such "priority which has been advanced in good faith before the loan "advanced by the commissioners and secured by a mortgage of the "property executed to a person who is entitled as a bona fide creditor "to the repayment thereof with interest. . . . ."

Sect. 21: "Where a mortgage of property has been given to secure "any loan granted by the Loan Commissioners, and default is made "in making payments according to the terms of such mortgage, then "at any time after such default and without any consent on the part "of any person interested in the equity of redemption of the mortgaged "property, the commissioners, without prejudice to any other remedy, "shall have power to do all or any of the following things; namely, "(1.) take possession of the mortgaged property or any part thereof; ". . . ."

Sect. 22: "The Loan Commissioners, when authorised to take "possession of any mortgaged property, may take possession either "by themselves or by any person appointed by them (whether such "person is interested in the mortgaged property or not), and upon "possession of any mortgaged property being so taken—(1.) All the "estate, right, interest, powers, authorities, and privileges, of what "nature or kind soever, which were at the time of the making of the "mortgage or may for the time being be vested in or exercisable by "the mortgagor or any person claiming through or under the mortgagor, "either in relation to the property or necessary for carrying on and "managing the same, shall become vested in the secretary of the "commissioners; . . . ."

Sect. 33: "Every sum payable under any security made in "pursuance of this Act shall be made payable to the use of Her "Majesty, her heirs and successors, and may be recovered as a specialty "debt due to the Crown, in like manner as if the security had been "made in the form provided by the Act of the thirty-third year of the "reign of Henry the Eighth, chapter thirty-nine; but no person "shall be liable for any larger sum than that which he is expressed to "be bound to pay. Every sum payable in respect of a loan granted "by the Loan Commissioners (either before or after the passing of this "Act) or under the security for such loan, shall be compounded for "or released only under the authority of Parliament in each case. "The Loan Commissioners may issue a warrant to the proper officer "forthwith to enforce payment of such debt to the Crown as afore-"said, ..."

Sect. 50: "Except so far as a special Act, by express reference to "some part of this Act, alters that part, every loan made by the Loan "Commissioners shall, notwithstanding any provision in such special "Act and any rule of law or custom, be made in accordance with and "under the powers of this Act, and be repayable in manner provided "by this Act, and by the security for the same granted under this "Act, and every such loan, together with the security for the same, "shall have the priority and be subject to the powers, authorities, and "remedies mentioned in this Act; and although made in pursuance of "a special Act, shall be deemed for all purposes to be a loan under this "Act."

Sect. 51: "In this Act, ... the expression 'special Act' means "any Act passed before the passing of this Act which authorises the "Loan Commissioners to lend money for the purposes of any work "mentioned in the first schedule to this Act and any Act passed after "the passing of this Act, which authorises the Loan Commissioners "to lend money for any purpose: . . . ."

By Agricultural Credits Act, 1923, s. 1, sub-s. 1: "At any time "within five years after the passing of this Act, and subject to such "conditions as the Treasury may prescribe, and up to an aggregate "amount approved by the Treasury, the Public Works Loan "Commissioners may, in manner provided by the Public Works Loans "Act, 1875, as amended by this section, ... make advances direct "to borrowers on recognised mortgages, ..."

Sub-sect. 2: "A mortgage shall be deemed to be a recognised "mortgage if it complies with the following conditions—(*a*) the borrower "must be a person who has agreed to purchase the land comprised in "the mortgage not earlier than April 5, 1917, nor later than June 27, "1921. . . . ." (*b*) "the land comprised in the mortgage must be "wholly or mainly agricultural land: . . . ."

By Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2: "Subject "to the provisions of this section, a person shall not be entitled, except "with the leave of the appropriate court,—(*a*) to proceed to exercise "any remedy which is available to him by way of— . . . . (ii.) the "taking possession of any property or the appointment of a receiver "of any property; (iii.) re-entry upon any land; (iv.) the realization "of any security or the forfeiture of any deposit; . . . ."

By Compensation (Defence) Act, 1939, s. 1, sub-s. 1: "Where, in "the exercise of emergency powers during the period beginning with "August 24, 1939, and ending with such day as His Majesty may by

"Order in Council declare to be the day on which the emergency "came to an end—(*a*) possession of any land has been taken on "behalf of His Majesty, ... then, subject to the following provisions "of this Act, compensation assessed in accordance with those provisions "shall be paid, out of moneys provided by Parliament, in respect of the "taking possession of the land, the requisition or acquisition of the "property, or the doing of the work, as the case may be."

Sect. 2, sub-s. 1: "The compensation payable under this Act in "respect of the taking possession of any land shall be the aggregate "of the following sums, that is to say,—(*a*) a sum equal to the rent "which might reasonably be expected to be payable by a tenant in "occupation of the land, during the period for which possession of the "land is retained in the exercise of emergency powers, under a lease "granted immediately before the beginning of that period, whereby the "tenant undertook to pay all usual tenant's rates and taxes and to "bear the cost of the repairs and insurance and the other expenses, if "any, necessary to maintain the land in a state to command that "rent, ..."

Sect. 2, sub-s. 2: "Any compensation under paragraph (*a*) of the "preceding sub-section shall be considered as accruing due from day "to day during the period for which the possession of the land is taken "in the exercise of emergency powers, and be apportionable in respect "of time accordingly, and shall be paid to the person who for the "time being would be entitled to occupy the land but for the fact that "possession thereof is retained in the exercise of such powers; but this "sub-section shall not operate so as to require the making of payments "at intervals of less than three months. For the purposes of the "enactments relating to income tax and the enactments relating to "land tax, and in particular for the purposes of such of those enactments "as relate to the deduction of tax from rent, any compensation under "the said paragraph (*a*) shall be deemed to be rent payable for the land, "the Crown shall be deemed to pay it as tenant occupier, and the person "receiving it shall be deemed to receive it as landlord."

By s. 17 the phrase "emergency powers" is defined as meaning "any power conferred by (*a*) regulations made under the Emergency "Powers (Defence) Act, 1939, as part of the law of the United Kingdom."

By Possession of Mortgaged Land (Emergency Provisions) Act, 1939, s. 1, sub-s. 1: "Where any land is the subject of a mortgage made "before September 3, 1939, the mortgagee shall not be entitled to obtain "possession of the land, unless default has been made in payment of "the mortgage money or any part thereof or of any interest thereon, "or there has been a breach on the part of the mortgagor, or of some "person concurring in the making of the mortgage, of any obligation "arising under or by virtue of the mortgage, other than an obligation "to pay the mortgage money or interest thereon."

Sub-s. 2: "For the purposes of this section, default shall not be "deemed to have been made in payment of any mortgage money, "unless a written demand for payment has been served on the person "liable, and a period of three months has elapsed since the service of "the demand: Provided that this sub-section shall not apply where "the mortgage money is repayable by instalments."

UTHWATT J.

1941
May 26.

In re SCAD, LIMITED.

Company—Dissolution—Claim by Inland Revenue Commissioners against company—Application for order annulling dissolution—Period within which order must be made—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 294, *sub-s.* 1.

The court has jurisdiction, under s. 294, sub-s. 1, of the Companies Act, 1929, to make an order declaring the dissolution of a company to have been void after the expiration of two years from the date of the dissolution, provided that the application for the order was made within that period.

In re Keystone Knitting Mills Trade Mark [1929] 1 Ch. 92 referred to.

On April 3, 1939, Scad, Ld., a private company, the main object of which was to invest the moneys of the company or otherwise acquire and hold securities and investments issued or guaranteed by any company constituted or carrying on business in any part of the world, was dissolved, as a result of a members' voluntary winding up entered into in 1938.

On March 31, 1941, on an application being made on behalf of the Crown, notice of motion was issued in which it was stated that the court would be moved, on behalf of the Crown, that the dissolution of the company might be declared void. The notice was served on the liquidator of the company on April 4, 1941.

At the hearing of the motion, on May 26, 1941, the question arose whether, on the true construction of s. 294, sub-s. 1, of the Companies Act, 1929, the jurisdiction of the court to make an order under that sub-section could only be exercised, if the order were made within two years of April 3, 1939, the date of the dissolution of the company (1).

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(1) By s. 294, sub-s. 1, of the Companies Act, 1929, it is provided: "Where a company has "been dissolved, the court may "at any time within two years "of date of the dissolution, on an "application being made for the "purpose by the liquidator of "the company or by any other "person who appears to the "court to be interested, make an "order, upon such terms as the "court thinks fit, declaring the "dissolution to have been void, "and thereupon such proceedings "may be taken as might have "been taken if the company had "not been dissolved."

J. H. Stamp, for the applicant, the Attorney-General. It is not necessary that the order should be made within two years of the date of the dissolution of the company so long as the machinery of the court has been set in motion within that period. The application, under which the machinery of the court was set in motion in this case, was issued on March 31, 1941, i.e., within two years of April 3, 1939, the date of the dissolution, and the court will not allow unavoidable delays in the administration of justice, which are not due to the default of one of the parties, to interfere with the rights of the parties. The principle stated in *In re Keystone Knitting Mills Trade Mark* (1) applies.

Gedge for the respondent, the liquidator of the company. The words of the section clearly state that the court may, on an application being made for the purpose, at any time within two years of the date of the dissolution, make an order declaring the dissolution to have been void. If the court has not made an order within two years, that is due to delay on the part of the applicant. If the applicant leaves the matter until the last few days of the period of two years, the matter may not come before the court in time for the order to be made. The question is one of the construction of the section itself.

UTHWATT J. This case raises a short point, namely, whether, on the true construction of s. 294 of the Companies Act, 1929, the jurisdiction of the court to make an order under that section can only be exercised if the order can in fact be made within two years of the date of the dissolution of the company. It undoubtedly is a plausible way to read the section as requiring an affirmative answer to be given to this question, but I think an affirmative answer is incorrect. It appears to me that, reading the section against the background on which the court necessarily acts and having regard to the fact that neither litigant can control the date at which the court makes its order, the two-year period referred to is the period between the date of the dissolution of the company and the date of the

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(1) [1929] 1 Ch. 92.

UTHWATT J.
1941
SCAD, LD., *In re.*

issue of the application for the order. I, therefore, hold that there is jurisdiction to make the order.

Solicitors: *Solicitor of Inland Revenue; Ashurst, Morris, Crisp & Co.*

J. L. D.

In re OWERS.

PUBLIC TRUSTEE *v.* DEATH.

SIMONDS J.

1941
May 13.

Administration — Leaseholds — Entry into possession by executors — Personal liability — Right to retain fund out of estate by way of indemnity—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 26.

When executors enter into possession of a testator's leaseholds, thereby becoming personally liable, by virtue of privity of estate, on the covenants contained in the leases, they should be at liberty to retain out of the estate a fund by way of indemnity against that liability, since s. 26 of the Trustee Act, 1925, does not protect them in respect of it but covers only their liability as executors.

ADJOURNED SUMMONS.

Ernest Owers, the testator, who made his will on April 23, 1938, died on November 20, 1938. At that time he owned a large number of leasehold properties. In every case in which he had become the assignee of a lease he had entered into covenants to pay the rent and perform the lessee's covenants in the lease and keep the assignor indemnified. On his death the Public Trustee and Merton Addlestone Jones, the executors, entered into possession of those leasehold properties. By a summons taken out on January 2, 1940, they asked (inter alia) whether having regard to their personal or possible personal liabilities under or by virtue of the leases vested in the testator at his death and then vesting in them they might properly retain out of the estate a fund by way of indemnity against such liabilities.

Wilfrid Hunt for the executors. But for s. 26 of the Trustee Act, 1925 (1), it would be clear that a fund should be ordered

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(1) By the Trustee Act, 1925, s. 26, sub-s. 1: "Where a "personal representative or trus- "tee liable as such for—(*a*) any "rent, covenant or agreement "contained in any lease; or (*b*) "any rent, covenant or agreement "payable under or contained in "any grant made in consideration "of a rentcharge; or (*c*) any "indemnity given in respect of "any rent, covenant or agree- "ment referred to in either of "the foregoing paragraphs, satis- "fies all liabilities under the "lease or grant which may have "accrued, or been claimed, up "to the date of the conveyance

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to be set aside for the protection of the executors. But that section covers only their liability as such—not the liability which by reason of privity of estate they have incurred by taking possession of the testator's leaseholds. A sufficient indemnity should be set aside for their protection. He referred to Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., p. 1307, and Carson's Real Property Statutes, 3rd ed., p. 1046.

Wynn Parry K.C. and *R. Gilbert* for persons interested under the will. No fund need be set aside as s. 26 of the Act sufficiently safeguards the executors from liability in respect of the leases. They referred to *Dodson* v. *Sammall* (1); *In re Nixon. Gray* v. *Bell* (2); *In re Lewis. Jennings* v. *Hemsley* (3).

SIMONDS J. [having stated the question :] The material fact was that, at the date of his death, the testator was possessed of a large number of leasehold properties. There is no question but that his executors entered into possession of them and became, by virtue of the privity of estate thereby created, personally liable on the covenants contained in the leases. It is true that there are some limitations upon this personal liability of an executor, notably he may not be liable for the full rent reserved by the lease, but only for the letting value of the premises therein comprised, but he is under a personal liability and to protect him from that personal liability the court will decree that a sufficient sum be retained for his protection. Where he is under no personal liability, but is

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" hereinafter mentioned, and, " where necessary, sets apart a " sufficient fund to answer any " future claim that may be made " in respect of any fixed and " ascertained sum which the lessee " or grantee agreed to lay out on " the property demised or granted " . . . . . the personal representative or trustee may convey " the property demised or granted " to a purchaser legatee or devisee " . . . . . and thereafter—(i.) he " may distribute the residuary " real and personal estate of the " deceased testator . . . . (ii.) notwithstanding such distribution, " he shall not be personally liable " in respect of any subsequent " claim under the said lease or " grant."

(1) (1861) 1 Dr. & Sm. 575.

(2) [1904] 1 Ch. 638.

(3) [1939] Ch. 232.

only under a liability as executor, the court will not decree that a fund is to be set aside for his protection. That is clear from the cases which have been cited, the last of which, I think, was *In re Nixon. Gray* v. *Bell* (1), which I had occasion to review myself in the recent case of *In re Lewis. Jennings* v. *Hemsley* (2). But this is a case where, apart from s. 26 of the Trustee Act, 1925, it would be proper to order that a fund should be set aside for the protection of the executors.

It is said, however, that the section is a sufficient safeguard and that no fund need be set aside. I cannot take that view. The section is as follows. [His Lordship read the section and continued:] It is clear to me that the section deals only with the liability of the executor as such and it is not intended to cover the cases where the executor has entered into possession of the testator's leaseholds and thereby incurred, in addition to his liability as executor, the personal liability of an assignee of the term. The section which I am now considering adopts, with certain modifications, the provisions of ss. 27 and 28 of the Law of Property (Amendment) Act, 1859 (Lord St. Leonard's Act), in regard to which it had never been suggested that it covered the personal liability of the executor who had entered into possession of his testator's leaseholds. That view is taken and, in my opinion, correctly taken by the text books, Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., p. 1307, and Carson's Real Property Statutes, 3rd ed., p. 1046. Accordingly, since the section does not protect the executors, it is necessary to follow the old practice of the court and to decree that a sufficient indemnity be set aside for their protection.

I have not got the materials to determine what the amount of that protection should be, and it must be referred back to chambers to ascertain what is a sufficient sum to set aside.

Solicitors: *Merton Jones, Lewsey & Jefferies; Vandercom, Stanton & Co.*

(1) [1904] 1 Ch. 638.

(2) [1939] Ch. 232.

F. C.

FARWELL J.

1941

May 6, 13.

ROADWAYS TRANSPORT DEVELOPMENT, LIMITED v. ATTORNEY-GENERAL.

Army — Impressment — Vehicle — State of emergency — Payment of compensation to possessors—Claim by owners—The Army Act, s. 113, *sub-s.* 4; s. 115.

A vehicle having been impressed under s. 115 of the Army Act for purchase for His Majesty's Forces, payment was made to the persons in possession at the time and not to the owners :—

Held, that the payment was not to be deemed a payment made to the owners by reason of the provisions of s. 113, sub-s. 4, of the Act, since that sub-section applies only to impressment under s. 112 and not to impressment under s. 115.

ADJOURNED SUMMONS.

By a written agreement dated June 22, 1939, Roadways Transport Development, Ld., the owners, let a motor-truck on hire-purchase to Turner & Riches, the hirers, on the terms (inter alia) that it remained their sole and absolute property until the hirers should pay the total rent payable and exercise the option to purchase. The hirers paid the deposit and one instalment only. Under the provisions of the agreement, the owners were entitled on and after August 29, 1939, to retake possession of the truck. On October 24, 1939, Great Britain being then at war, pursuant to a requisition of emergency under s. 115 of the Army Act, a warrant for the provision of the truck for the purpose of its being purchased was issued and served on A. Hutchin (Haulage), Ld., who, unknown to the owners, had possession of the truck, although by what title did not appear. At the time of the impressment Captain White, the impressment officer, was informed that the truck was subject to a hire-purchase agreement and who were the owners. He completed Army Form A. 2032 headed: "Receipt "for one vehicle impressed for purchase for His Majesty's "Forces." This document showed (inter alia) the name and address of the company from whose possession the truck was taken and the amount of the assessed compensation, 380*l.* Nothing was filled in under the heading: "If person from "whom impressed is *not* the owner, give name and address of "owner below." Under the heading "In case of *dual* "*ownership* or *hire-purchase* give name and address of other "interested party or hire-purchase company below," the name and address of the owners was filled in. After the signature of the impressment officer were the words: "Payment will "be made to you by the Command Paymaster, Eastern "Command, London, S.W.1. No claim need be made. "Sect. 113, sub-s. 4, of the Army Act provides that 'In the "'event of the property being vested in another person or "'persons, the possessor shall notify all others interested in "'the property and adjust the amount received in due proportion. In the event of any difference arising, the amounts "'shall be apportioned on a certificate of a county court "'judge as aforesaid.'" One copy of this document was left with the possessors, and two others, which were identical save that the footnotes containing instructions varied, were sent to the officer commanding the unit to which the truck was to be delivered and to the command paymaster. The impressment officer retained a fourth copy himself. The truck was delivered to His Majesty's Forces, and on October 26, 1939, the Army Council caused 380*l.* to be paid to A. Hutchin (Haulage), Ld. No sum was paid by them to the owners in respect of it.

The owners took out a summons to which the Attorney-General was defendant, to determine whether, on the true construction of the Army Act, the payment made to the possessors was to be deemed to be a payment made to the owners of the truck. A. Hutchin (Haulage), Ld., were not joined as parties, but the court, although considering that the more convenient course would have been to join them, consented at the request of the parties to deal with the case in its present form.

The relevant sections of the Army Act are set out in the judgment of the court.

Honeyman for the owners. There are three distinct forms of impressment: (1.) impressment on route; (2.) a form of impressment for hire under a requisition of emergency;

(3.) and impressment for the provision of vehicles by purchase under a requisition of emergency. The last-mentioned is the present case. The scope of s. 113 of the Army Act does not extend beyond impressment on route, and, therefore, the provisions of s. 113, sub-s. 4, do not apply to a case, such as the present, of purchase under s. 115 and the ordinary principle that the owner of an article is entitled to receive the price for it applies.

Danckwerts for the Attorney-General. The Army Council has a good discharge in respect of the sum due. The provisions as to payment in s. 113, sub-s. 4, are incorporated in s. 115. The Army Council is entitled to pay the person in possession of a requisitioned vehicle and the onus of passing the money on to the owner is then thrown on that possessor. These are emergency provisions and it was intended that the Army should deal with possessors without investigating matters of ownership.

FARWELL J. [having stated the facts :] The question which I have to determine depends wholly on the true construction of certain sections of the Army Act relating to the impressment of carriages and animals. The first of these is s. 112: "(1.) Every justice of the peace in the United Kingdom "having jurisdiction in any place mentioned in a route issued "to the commanding officer of any portion of the regular "forces shall, on the demand of such commanding officer, "or of any officer or non-commissioned officer authorised by "him, and on production of such route, issue his warrant "requiring some constable or constables having authority in "such place to provide, within a reasonable time to be named "in the warrant, such carriages, animals, and drivers as are "stated to be required for the purpose of moving the regi-"mental baggage and regimental stores of the forces men-"tioned in the route in accordance with the route; and the "constable or constables shall execute such warrant, and "persons having carriages and animals suitable for the said "purpose shall, when ordered by a constable in pursuance of "such warrant, furnish the same in a state fit for use for the "aforesaid purpose. (2.) The route for the purpose of this "section shall be such route as is mentioned in the foregoing "provisions of this part of this Act with respect to billeting. "(3.) A route purporting to be issued and signed as required "by those provisions, if delivered to an officer or non-"commissioned officer by his commanding officer, shall be a "sufficient authority to such officer or non-commissioned "officer to demand carriages and animals in pursuance of this "Act, and when produced by an officer or non-commissioned "officer shall be conclusive evidence to a justice and constable "of the authority of the officer or non-commissioned officer "producing the same to demand carriages and animals in "accordance with such route." There is a provision in sub-s. 5 that, in the event of there not being sufficient carriages or animals to be "procured within the jurisdiction "of the said justice, any justice having jurisdiction in the "next adjoining place shall, by a like course of proceeding, "supply the deficiency."

Sect. 113 is in these terms: "(1.) There shall be paid in "respect of carriages and animals furnished in pursuance of "the foregoing section of this Act the rates of payment "commonly recognised or generally prevailing in the district "at the time of impressment, and if any difference arises "respecting the amount payable, the amount shall be such as "may be fixed by a certificate of a county court judge having "jurisdiction in any place in which the carriage or animal "was furnished or through which it travelled." I think that it is clear that s. 113 refers directly back to the form of impressment to which the Army Council is entitled to have resort under s. 112, that is to say, the power to impress carts and other vehicles, and horses, on a given route, for the purpose of moving the regimental baggage and regimental stores of the forces. "(2.) For the purposes of fixing such amount the "provisions set out in the Sixth Schedule to this Act shall "have effect." In the sixth schedule to the Act there is the side-note, "Section 113" and then, "Provisions as to "determining amount to be paid for articles requisitioned." Para. 3 provides: "In the case of impressment for hire,

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ROADWAYS TRANSPORT DEVELOPMENT, LD. *v.* ATTORNEY-GENERAL.

"the amount fixed by the certificate shall be such amount as "appears to the county court judge to be a fair rate of hire ". . . . ." Sub-s. 4 of s. 113 is in these terms: "The "possessor of any carriage or animal at the time of impress-"ment shall be deemed to be the owner for the purposes of "the procedure of impressment where it is not otherwise "declared at the time, and payment made to the possessor "shall be deemed to be payment to the owner. In the event "of the property being vested in another person or persons, "the possessor shall notify all others interested in the property "and adjust the amount received in due proportion. In the "event of any difference arising, the amount shall be appor-"tioned on a certificate of a county court judge as aforesaid."

By s. 115, which is an important section for this purpose: "(1.) His Majesty by order, distinctly stating that a case of "emergency exists, and signified by a Secretary of State, "may authorise any general or field officer commanding the "regular forces in any military district or place in the United "Kingdom to issue a requisition under this section (hereinafter "referred to as a requisition of emergency)." It is not disputed that at the time when this particular truck was requisitioned a state of emergency existed. "(2.) The officer "so authorised may issue a requisition of emergency under his "hand reciting the said order, and requiring justices of the "peace to issue their warrants for the provision, for the "purpose mentioned in the requisition, of such carriages and "animals as may be provided under the foregoing provisions, "and also of carriages of every description and of horses of "every description, whether kept for saddle or draught, and "also of vessels . . . . (3.) A justice of the peace, on demand "by an officer of the portion of His Majesty's forces mentioned "in a requisition of emergency, or by an officer of the Army "Council authorised in this behalf, and on production of the "requisition, shall issue his warrant for the provision of such "carriages, animals, vessels, food, forage and stores as are "stated by the officer producing the requisition of emergency "to be required for the purpose mentioned in the requisi-"tion . . . . (3A.) A requisition of emergency may authorise "any officer mentioned therein to require any carriages and "horses furnished in pursuance of this section to be delivered "at such place (not being more than one hundred miles in "the case of a mechanically propelled carriage or trailer, "and not being more than ten miles in the case of any other "carriage or any horse, from the premises of the owner) and "at such time as may be specified by any officer mentioned in "the requisition, and in such case it shall be the duty of a "constable executing a warrant issued by a justice of the "peace under this section upon the demand of an officer "producing the requisition of emergency to insert in his "order such time and place for delivery of any vehicle or horse "to which the order relates as may be specified by such "officer, and the obligation of owners to furnish carriages "and horses shall include an obligation to deliver the carriages "and horses at such place and time as may be specified in "such order notwithstanding that a receipt may be given by "the officer mentioned in the warrant at the time of impress-"ment, and the provisions of this Act shall have effect as if "references therein to the furnishing of carriages and horses "included, as respects any such carriage or horse as aforesaid, "delivery at such time and place as aforesaid. . . . . (4.) The "sum to be paid for any article shall be deemed to have been "tendered when a formal receipt for the article setting forth "the amount is handed to the owner or his representative, but "the property in a carriage or animal impressed shall be "vested in the owner until such time as the carriage or animal "has been duly furnished at the place and time stipulated."

As appears from the form which was given to the company in the possession of which the truck was, it seems to have been assumed on behalf of the Army Council that sub-s. 4 of s. 113 applies to every case of impressment in whatever circumstances that impressment may have been made, and that, accordingly, in every case the impressment officer is not concerned to see that the owner of the chattel receives the purchase money, but that payment can be made to the possessor for the time being who is deemed to be the owner for the purposes of the impressment, the payment being deemed to be payment to the owner. I am quite unable to accept that view. It seems to me that there is no justification for taking a sub-section out of s. 113 and applying it to other sections which deal with impressment in different circumstances from those contemplated by ss. 112 and 113. Sub-s. 4 of s. 113 deals with a form of impressment which is distinct from that covered by s. 115, for ss. 112 and 113 relate to the impressment of vehicles for the purpose, and for the purpose only, as I read the Act, of removing the regimental baggage and regimental stores along a particular route. I think that when that duty has been performed and the articles have been moved by the vehicle which has been impressed the purposes of the impressment have come to an end. That is a case, as it seems to me, in which the appropriate payment for the use of the vehicle is compensation by way of hire as contemplated in Schedule VI. When one comes to s. 115, a totally different position is being considered. To give the Army authorities the right to impress under that section there must be—and this is quite distinct from s. 112—a state of emergency. The section, too, deals not with a case in which a vehicle is impressed for some particular purpose as under s. 112, but with the impressment of a vehicle for use generally by the Army, and the compensation to be paid for it is assessed by the impressment officer having regard, no doubt, to the capital value of that which has been requisitioned. Moreover, to import sub-s. 4 of s. 113 into s. 115 would appear to be quite inconsistent with sub-s. 4 of s. 115, which provides: "The sum to be paid for any article shall be deemed "to have been tendered when a formal receipt for the article "setting forth the amount is handed to the owner or his "representative." In the present case, the company in possession of the truck were not the owners, nor can it be suggested that they were the owner's representative. How they came into possession of the truck, or what right they had to possession, does not appear. They were not the hirers under the hire-purchase agreement, and they were not the representatives of the owners to receive money or take a receipt. It is quite impossible, in my judgment, to read "owner or his

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"representative" in s. 115, sub-s. 4, as meaning the person who is in possession, leaving that person to adjust the rights of the parties.

I appreciate that the effect of my decision may be extremely inconvenient from the point of view of the Army Council. It may be that they have no desire to take upon themselves what may be a difficult question to determine in some cases, namely, who is the true owner of the vehicle impressed, but they are not justified by sub-s. 4 of s. 113 in impressing a vehicle under s. 115 and handing a receipt for the vehicle to the man who happens to be in possession at the time, without regard to the true owner. It follows that the payment in this case, having regard to the form of impressment, should have been made to the plaintiff company, who can now say that they have not been paid any compensation for the vehicle, and that the fact that some other persons, unauthorized by them and not their representatives, have received some sum as compensation for the requisition of this vehicle does not concern them.

In these circumstances, I must make a declaration that, on the true construction of the Army Act and on the facts of this case, the payment made on October 26, 1939, by or on behalf of the Army Council to A. Hutchin (Haulage), Ld., is not to be deemed to be a payment made to the owner or owners of the vehicle.

Solicitors: *Kimber, Bull & Co.*; *Treasury Solicitor.*

F. C.

MORTON J.

1941
May 6.

In re CORBYN.

MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED *v.* ATTORNEY-GENERAL.

Charity—Charitable bequest—Provision for boys being trained as officers in the Royal Navy or mercantile marine—Monthly allowance of money to keep up appearance and dignity—Purpose beneficial to community.

The residuary estate of a testator was given to trustees to invest and form a fund for the benefit and interest of selected boys from a training ship to be trained in some other establishment with a view to their taking commissions in the Royal Navy or becoming officers in the mercantile marine :—

Held, that the trust was one for purposes beneficial to the community within the classification of charitable purposes by Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel* [1891] A. C. 531, 583, and was, therefore, a valid charitable bequest.

SUMMONS.

The plaintiffs, the Midland Bank Executor and Trustee Company, Ld., took out this summons as trustees of the will, dated March 6, 1934, of Joseph Charles Corbyn, who died on December 10, 1939. The respondents to the summons were the Attorney-General and Mrs. Alice Beatrice Johnson, who was the sister and sole next-of-kin of the testator.

The testator by his will gave and bequeathed to his trustees "all my worldly possessions, moneys, furniture, hangings, "table-ware, cutlery, residue of my stock in trade of whatever "description, investments, stocks and shares, bonds, bank "balance, and any possession to which I have a claim, the "proceeds of which are to be invested, and the interest of such "investments to form a fund, and which fund is to be used "as directed for the sole benefit and interest of the boy or "boys as selected of the training ship *Exmouth,* lying off "Grays, Essex." [The *Exmouth* belonged to and was under the control of the London County Council and was used as a training ship for boys with a view to their taking up a maritime career.] The will continued : "The selected boy "or boys to be sent to a training school or ship selected "by the captain superintendent or officer in charge of the

"T. ship *Exmouth*, the boy or boys to be educated and instructed "and trained to become an officer in his Majesty's Navy "(Britannic) or the British Mercantile Marine, each individual "boy's opinion and liking to be consulted as to which service, "British Navy or British Mercantile Marine, he desires to join. "The expenses of training, educating, clothing, supply of "instruments and other necessaries for the efficient training, "etc., to fit him or them for the career of an officer and "gentleman, each boy to be given an allowance monthly of "money to enable him to keep up the dignity and appearance "of an officer and gentleman. Such allowance to be continued "until such time as his pay is sufficient to worthily support "him or until attaining the rank of lieutenant or the equivalent "rank of mate (unless voluntarily relinquishing the allowance) "the sooner to enable other boys the opportunity to benefit "under this legacy."

The question raised by the summons was whether or not the bequest set out above was a valid charitable bequest.

G. Maddocks for the plaintiffs.

G. Cross for the Attorney-General. This is a good charitable bequest, coming under either the second or the fourth head of the definition of charitable objects in Lord Macnaghten's judgment in *Income Tax Commissioners* v. *Pemsel* (1), that is, either education or some other purpose beneficial to the community. The training of a boy for a commission in the Royal Navy is clearly educational, and the training of officers in the mercantile marine is an object most beneficial to the community and of the greatest public importance at any time, but especially at present. A scheme for the application of the fund should be directed.

Hunt for the next-of-kin. The bequest creates a perpetuity, and is outside the limits of a charitable trust. Education means general training of youth, and does not include specialized training to fit a man for practising a particular trade or profession. The training of a naval officer may be a good charitable object, but training for the mercantile marine is not. The

(1) [1891] A. C. 531, 583.

provision of a monthly allowance to enable the boys to keep up appearances prevents this bequest from creating a charitable trust. It is private benevolence, but not within any public purpose. If the gift is partly void, it is wholly void.

Cross replied.

MORTON J. [after stating the facts as set out above:] This summons raises an interesting point under what appears to be a home-made will.

The first question raised by the summons is "whether the "gift and bequest by the testator's will dated March 6, 1934, "of a fund to be established and applied as therein directed "for a boy or boys of the training ship *Exmouth* lying off Grays, "Essex, is a valid charitable bequest or fails for uncertainty, "remoteness or any other reason." It was not contended before me that there was any uncertainty in the terms of the bequest, but clearly the trust contemplated by the testator is one which may last for an indefinite period, and it would be bad as infringing the rule against perpetuities unless it is a charitable trust.

Counsel for the Attorney-General argues that it is a good charitable trust, and that it comes under either the second head set out in Lord Macnaghten's judgment in *Income Tax Commissioners* v. *Pemsel* (1), namely, "trusts for the advancement of education," or, alternatively, that it comes under the fourth of Lord Macnaghten's four heads: "trusts for other "purposes beneficial to the community, not falling under any "of the preceding heads." The purpose of the trust is that the selected boy or boys shall be sent from the training ship, *Exmouth*, to another training school or ship, and they are to be educated, instructed and trained "to become an officer "in his Majesty's Navy or the British Mercantile Marine." Each boy is to have the opportunity of choosing which service he desires to join and the trust provides for the expenses of educating, clothing, supplying instruments and other necessaries for the efficient training of a boy for the career of an officer and gentleman. It also provides that each boy is to

(1) [1891] A. C. 531, 583.

be given an allowance monthly of money to enable him to keep up the dignity and appearance of an officer and gentleman. I entertain no doubt that the amount of the monthly allowance there mentioned is left to the discretion of the trustee.

Apart from the provision with regard to the monthly allowance, the trust is similar to trusts for the further education of boys on leaving school. It is true that, as Mr. Hunt points out, it is not a trust for the general education of the boy, but for special education for a particular purpose. I think, however, that, without the presence of the provision as to a monthly allowance, I should feel disposed to hold that this was in the nature of a gift for education in a particular branch of study and that the trust was one for the advancement of education within the meaning of Lord Macnaghten's second head in *Income Tax Commissioners* v. *Pemsel* (1). Gifts for a school of art, for technical education, and for the advancement and provision of education in economic science in Great Britain have been held to be charitable gifts: see *In re Allsop* (2), *In re Vagliano* (3), and *In re Berridge* (4). I cannot, however, arrive at the conclusion that this gift falls wholly under the second head, because I think that the purposes travel outside what would ordinarily be spoken of as educational purposes.

Another possible head which might have been suggested is that of the "setting out of soldiers." This is one of the objects included in the preamble to the statute 43 Eliz. c. 4. Mr. Hunt, for the next-of-kin, did not dispute that the Royal Navy was on the same footing as the Army for this purpose, but he pointed out that all the boys might choose to go into the mercantile marine, which would not be regarded as being within the words "setting out soldiers." I think that that objection is well founded.

I have come to the conclusion that the trust is one for purposes beneficial to the community within the fourth of Lord Macnaghten's heads in *Income Tax Commissioners* v. *Pemsel* (1). As regards the instructing and training of boys to become officers in the Royal Navy, I think that there

(1) [1891] A. C. 531, 583.
(2) (1884) 1 Times L. R. 4.
(3) [1905] W. N. 179.
(4) (1890) 63 L. T. 470.

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CORBYN, *In re.* MIDLAND BANK EXECUTOR AND TRUSTEE CO. *v.* ATTORNEY-GENERAL.

can be no doubt at all that that is a purpose beneficial to the community and a charitable purpose. As regards the training of boys to become officers in the mercantile marine, it seems to me that this must also be a purpose beneficial to the community within the words used by Lord Macnaghten. The mercantile marine is essential to the community in the present time of war, but at all times, unless and until this country can produce within its borders all the food and other essentials of life which it requires, the mercantile marine must be kept in existence and it is of the greatest importance that boys should be suitably and efficiently trained to be its officers. With regard to the provision of such a monthly allowance as a boy may require to keep up the dignity and appearance of an officer and gentleman, that seems to me to be a purpose which is ancillary to the main purpose. It may meet the difficulty confronting a boy whose parents are poor who might be prevented from following the career in question by reason of the lack of any means over and above his pay. It seems to me that to meet that difficulty is a purpose beneficial to the community. I do not think that the presence of this provision in the will has the effect of bringing the trust outside the bounds of a charitable trust.

For these reasons I am of opinion that the bequest in question is a valid charitable bequest.

Solicitors: *Baddeley, Wardlaw & Co.; Treasury Solicitor.*

H. L. L.

JOHN BARKER AND COMPANY, LIMITED *v.* LITTMAN.

C. A.

1941

May 26.

Emergency legislation—Vendor and purchaser—Contract for sale of land—Order for specific performance—Purchaser's failure to comply—Order for rescission of contract and forfeiture of deposit—Discretion of court—Courts (Emergency Powers) Act, 1939 (2 & 3 *Geo.* 6, *c.* 67) *s.* 1, *sub-s.* 2 (*a*) (*iv.*).

By an agreement in writing, dated August 8, 1939, the defendant agreed to purchase and the plaintiffs to sell certain freehold and leasehold properties for the sum of 13,000*l.*, of which 650*l.* was paid by way of deposit to stakeholders. One of the conditions of sale contained the usual provision enabling the plaintiffs to forfeit the deposit and resell the property if the defendant defaulted in completing the purchase. On January 24, 1940, the plaintiffs obtained an order for specific performance with which the defendant failed to comply, and they then began, but afterwards abandoned, an application for leave to levy execution or otherwise enforce the judgment in accordance with the Courts (Emergency Powers) Act, 1939. The plaintiffs then moved for an order for the rescission of the contract and forfeiture of the deposit.

Held (affirming Bennett J.), (1.) that there was nothing in s. 1, sub-s. 2 (*a*) (iv.), of the Courts (Emergency Powers) Act, 1939, to prevent the order being granted without a previous application for the leave of the court, and (2.) that the plaintiffs were entitled to the order ex debito justitiæ, and, even if the court had had a discretion in the matter, it ought not in exercising it to have regard to the provisions of the Act.

APPEAL from Bennett J.

By an agreement in writing, dated August 8, 1939, the defendant agreed to purchase from the plaintiffs certain freehold and leasehold properties known as Nos. 80 and 82, High Street, Kilburn, for the sum of 13,000*l.*, of which 650*l.* was paid by way of deposit to the plaintiffs' solicitors as stakeholders. The date for completion of the purchase was fixed at September 29, 1939, and the special conditions of sale contained in cl. 20 the usual provision that, if the purchaser should neglect or fail to complete his purchase his deposit should be forfeited and the vendor might re-sell the property. On January 24, 1940, the plaintiffs commenced proceedings against the defendant for specific performance of the agreement and on April 29, 1940, an order was made for specific performance by the defendant, for the taking of the necessary accounts, for the execution by the plaintiffs of a proper transfer or transfers of the premises to the defendant and the delivery up of all documents of title, and for the payment by the defendant to the plaintiffs thereon of the balance certified to be due. On September 25, 1940, a certificate was made by which the net amount due from the defendant to the plaintiffs was ascertained as 12,846*l*. 10*s*. 9*d*., and October 9, 1940, was fixed as the date for payment to the plaintiffs. The defendant having failed to pay the money, the plaintiffs issued a summons for leave to proceed to execution or otherwise to the enforcement of the judgment notwithstanding the Courts (Emergency Powers) Act, 1939. The defendant filed affidavits from which it appeared that he was unable to complete the purchase of the property owing to circumstances resulting from the war. The plaintiffs then abandoned their attempt to enforce the judgment for specific performance, and on March 18, 1941, they moved for an order that the agreement of August 8, 1939, should be rescinded and the defendant's deposit money forfeited, and for a declaration that the plaintiffs could give a good receipt to the stakeholders for the deposit money. Bennett J. made the order asked for, but stayed proceedings to enforce the judgment pending an appeal. The defendant appealed.

Lindsay M. Jopling for the defendant. In view of the evidence that the court would not have allowed the plaintiffs to proceed to enforce the judgment for specific performance having regard to the Courts (Emergency Powers) Act, 1939, an order for rescission ought not to have been made. The court ought to have given the defendant time to complete the contract. It is a case for granting relief under the Act. Bennett J. took the view that he had no discretion in the matter and that the plaintiffs were entitled to an order for rescission and forfeiture of the deposit as of right, but when the origin of the jurisdiction to make this order is examined, it will be found to be a matter of discretion. It is true that the plaintiffs might have asked originally for specific performance or rescission of the contract but as they elected to ask for specific

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performance only, their subsequent application for rescission is a matter for the discretion of the court. It is also true that there is no case in the books where an order for rescission has been refused, but here the circumstances are peculiar because the plaintiffs would almost certainly have been refused leave to enforce their judgment for specific performance in view of the Act of 1939. By s. 1, sub-s. 1, the plaintiffs were prevented from proceeding to enforce a judgment for payment or recovery of a sum of money without the leave of the court. That is relevant on the question of the deposit being forfeited. [SCOTT L.J. The claim for forfeiture is not a claim for payment or recovery of a sum of money.] There is a direct provision in s. 1, sub-s. 2 (*a*), against forfeiture of a deposit without the leave of the court. [SCOTT L.J. Sub-sect. 2 (*a*) deals only with remedies exercised out of court.] No doubt it was so decided in *S. & A. Services, Ld.* v. *Dickson* (1), but, even if there is no provision of the Act directly applicable, in exercising its jurisdiction, the court should have regard to it. The law in regard to forfeiture of deposit is contained in *Dunn* v. *Vere* (2); *Jackson* v. *de Kadich* (3); and *Hall* v. *Burnell* (4). If the contract is rescinded the court has a discretion with regard to granting an order for forfeiture. [LUXMOORE L.J. In *Howe* v. *Smith* (5) there was no provision for forfeiture of the deposit in the contract and yet the court implied it. He also referred to *Shuttleworth* v. *Clews* (6) and *Scott* v. *Alvarez* (7).] On general principles the defendant should not be put to the loss of his deposit.

Charles Harman K.C. and *E. J. Heckscher* for the plaintiffs. The success of this appeal would involve making an entirely new contract between the parties. There is no ground for saying that the defendant has a stronger case against that part of the order which directs forfeiture of the deposit than against that which directs rescission of the contract. If rescission is granted, what is to become of the deposit? The defendant is really seeking to take advantage of his own

(1) [1940] 2 K. B. 219.
(2) (1870) 19 W. R. 151.
(3) [1904] W. N. 168.
(4) [1911] 2 Ch. 551.
(5) (1884) 27 Ch. D. 89.
(6) [1910] 1 Ch. 176.
(7) [1895] 2 Ch. 603.

wrong to enable him to get repayment of the deposit after he has failed to fulfil his contract. The Courts (Emergency Powers) Act, 1939, has no application here, but the defendant is asking the court to act as if it did apply. If the court has a discretion with regard to the order for rescission and forfeiture of the deposit, it is difficult to imagine a stronger case for its exercise in favour of the plaintiffs. As regards the deposit, the only order sought by the plaintiffs is that they should be able to give a good receipt to the stakeholders for the deposit. It is a legal remedy that the plaintiffs have sought to enforce here: *Howe* v. *Smith* (1). [Clauson L.J. In *Scott* v. *Alvarez* (2) the purchaser had contracted to accept a bad title and, therefore, although the contract could not be enforced, he could not get back his deposit.] That is the very case s. 49, sub-s. 2, of the Law of Property Act, 1925, was intended to meet.

[He was stopped.]

Scott L.J. [after stating the facts:] Bennett J., in a judgment with which I entirely agree, held that the plaintiffs were entitled, in view of the defendant's default, to the order for rescission and forfeiture of the deposit to the plaintiffs. Mr. Jopling took the point that he was assisted by the Courts (Emergency Powers) Act, 1939, in arguing that the defendant ought not to have been deprived of his right to the deposit, but it was pointed out to him that the words of the only relevant section of the Act did not assist him. By s. 1, sub-s. 2, of the Act it is provided: "Subject to the provisions "of this section, a person shall not be entitled, except with the "leave of the appropriate court—(*a*) to proceed to exercise "any remedy which is available to him by way of . . . . . "(iv.) the realisation of any security or the forfeiture of any "deposit." Those are the only words under which any such claim could be made as was advanced by Mr. Jopling, but the proceeding here was not one by which the plaintiffs claimed to exercise a remedy by way of forfeiture of the deposit. What he was seeking was a judgment to enable him to retain the money which, on the terms of the contract, was

(1) (1884) 27 Ch. D. 89.

(2) [1895] 2 Ch. 603.

his money, and Mr. Jopling conceded, after consideration, that he could not make any different submission on the construction of the Act. But, he said, a court of equity in such a case might well take into account the kind of consideration laid down in the Act. To that argument I am unable to assent. The Act was a very special Act, depriving plaintiffs of certain rights, particularly procedural rights, and it ought not to be extended beyond the fair interpretation of its language. I cannot myself see that a court of equity could find in the Act any principles of equity which would alter the present position. I leave to my brethren for further consideration that aspect of the matter.

Apart from that Act, the question is purely one of the interpretation of the contract of sale. The question has been considered by the courts on many occasions, and the principle laid down, as I read the decisions, is that which was enunciated in *Howe* v. *Smith* (1). There, on the sale of real estate, the purchaser paid 500*l.* which was stated in the contract to be paid as a deposit and in part payment of the purchase money. The purchaser was not ready, and, after repeated delays, the vendor re-sold the property for the same price, pursuant to a special term in the contract. The original purchaser then brought an action for specific performance, but the Court of Appeal held that, by his delay, he had lost his right to enforce specific performance, and, further, that the deposit, although according to the contract it was to be taken as part payment if the contract were completed, was also a guarantee for the performance of the contract, and that the plaintiff, having failed to perform his contract within a reasonable time, had no right to a return of the deposit. The use of the word "guarantee" is due to a passage in the judgment of Cotton L.J. (2), where he said: "What is the deposit? "The deposit, as I understand it, and using the words of James "L.J., is a guarantee that the contract shall be performed." That was said by James L.J. in *Ex parte Barrell* (3). In *Howe* v. *Smith* (4) Fry L.J. explained the principle on which the contract had to be construed in cases such as the one then before the court, in which there was no provision that the deposit should be forfeited in case of default by the purchaser, and he said: "Money paid as a deposit must, I conceive, "be paid on some terms implied or expressed. In this case "no terms are expressed, and we must therefore inquire what "terms are to be implied. The terms most naturally to be "implied appear to me in the case of money paid on the "signing of a contract to be that in the event of the contract "being performed it shall be brought into account, but if the "contract is not performed by the payer it shall remain the "property of the payee. It is not merely a part payment, but "is then also an earnest to bind the bargain so entered into, "and creates by the fear of its forfeiture, a motive in the "payer to perform the rest of the contract."

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(1) 27 Ch. D. 89.
(2) Ibid. 95.
(3) (1875) L. R. 10 Ch. 512.
(4) 27 Ch. D. 101.

That decision—which was followed in subsequent cases to which I do not think it necessary to refer—appears to me to establish that in such a case as the present the bargain is that the deposit shall, in the event of the sale going through, be applied in part payment of the price, but that, in the event of the sale failing to go through by reason, not of any default by the vendor, but of default by the purchaser, the deposit shall remain in the vendor's pocket as his property. In such a case it is clear that, if the deposit had been paid to the vendor, the purchaser would have no right to have it repaid to him, and, in my view, the same position necessarily results where the money is put into the hands of a stakeholder, who holds it on one condition only, namely, for the person who becomes entitled to receive it according to the terms of the contract, that is, for either the vendor or the purchaser, as the case may be. If the vendor makes default, obviously the stakeholder will hold the deposit for the purchaser. Otherwise, he holds it for the vendor, as his money. That brings in the common law principle that no action by the purchaser against the vendor in such circumstances as the present would lie for money had and received, because, as the principle is expressed in Bullen and Leake, 3rd ed., p. 44, to justify that cause of action the money must belong to the plaintiff—

that is, the purchaser—which he could not show, or it must have been received or held by the defendant—that is, the vendor—as belonging to the plaintiff, and ex hypothesi it would belong, not to the plaintiff purchaser, but to the defendant vendor. For these reasons, in my opinion, this appeal must be dismissed.

Clauson L.J. In this appeal Mr. Jopling frankly admitted that there was nothing in the Courts (Emergency Powers) Act, 1939, which required any condition precedent to be satisfied before an order for the rescission of the contract could be made. Indeed, that was decided by this court a few weeks ago in *Austins of East Ham, Ld.* v. *Macey* (1). Some observations were there made by Sir Wilfrid Greene M.R., referring to the possibility of there being a case where the vendor was seeking to obtain forfeiture of the deposit as well as rescission of the contract. That was not the position in the case then under consideration, although it had been the position in *Broadstairs Picture House, Ld.* v. *Littman* (2), a decision of Bennett J., which so far as it had to do with the matter before us in *Austins of East Ham, Ld.* v. *Macey* (1), was approved by this court as being correct.

As regards the forfeiture of the deposit, there again I understood Mr. Jopling to admit that he could not point to anything in the Courts (Emergency Powers) Act, 1939, which would necessitate some condition precedent being fulfilled before such an order could be made by the court, and there again I do not know that it would be really practicable to argue to the contrary in this court in view of the decision in *S. & A. Services, Ld.* v. *Dickson* (3), where we held, at all events with reference to part of s. 1, sub-s. 2 (*a*), of the Act of 1939, that the statutory provision had reference to cases of self-help and not to those of judicial remedy. That, I think, makes it difficult to argue that the words in s. 1, sub-s. 2 (*a*) (iv.), "the forfeiture of any deposit," import that some condition precedent must be fulfilled before the court can make what

(1) Ante, p. 338.
(2) [1940] Ch. 860.
(3) [1940] 2 K. B. 219.

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is called an order for forfeiture of the deposit. But the truth is that the phrase "forfeiture of the deposit" is a little misleading. In the case now under appeal the order that the deposit be forfeited to the plaintiffs really is nothing but a judicial statement that the defendant has no right in law or equity to recover the deposit from the plaintiffs or from the stakeholder. For myself, I am quite satisfied that Mr. Jopling was right in admitting that the Courts (Emergency Powers) Act, 1939, has no application to the making of such an order.

What then is left in this appeal? Mr. Jopling argued that the court had some dispensing power as regards making an order for the forfeiture of the deposit and for the rescission of the contract in such cases as the present where the plaintiff, having found himself unable adequately to enforce the order for specific performance, claimed the alternative relief of rescission, but, I am afraid, that he quite failed to persuade me that the court has any such power. The order, I think, has always been recognized as one which is to be made ex debito justitiæ. There have been a number of cases in which the right to make an order as to a deposit has been dealt with, and in some of them the circumstances were such as to induce the legislature to deal with the matter in s. 49 of the Law of Property Act, 1925. I entirely fail to recognize that the court has any dispensing power in the matter. I do not mean that the court has not power to extend the time for carrying out the contract, or to make some order of that kind, but, where the defendant is not prepared to carry out his contract and the plaintiff is prepared to put an end to it, I do not see how the court can hesitate for a moment in giving the plaintiff what he asks. The suggestion seems to be that, owing to the particular circumstances of the war, the legislature has seen fit to give the court power in certain defined cases to suspend the rights of some subjects of the Crown against other subjects, and that this court, therefore, in exercising its jurisdiction, ought, without any legislative sanction, to apply a general dispensing power where it thinks there is some hardship caused by the war. I know of no authority for any such proposition, and I do not believe any such proposition to be part of the law of England. Accordingly, in my view, the appeal fails.

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LUXMOORE L.J. I agree, and do not think it necessary to add anything.

Appeal dismissed.

Solicitors for defendant: *Wigram & Co.*
Solicitors for plaintiffs: *Baileys, Shaw & Gillett.*

H. C. G.

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May 19, 27, 29.

In re BELLVILLE.

WESTMINSTER BANK, LIMITED *v.* WALTON.

[1940. B. 1988.]

Will—Construction—Gift of fixed sum to each member of a class—Class closed at the death of testator.

Where a fixed sum is bequeathed to each member of a class such as the daughters of A., a daughter conceived and born after the death of the testator is excluded from taking as a member of the class by virtue of a rule of construction intended to remove the inconvenience that, if after born daughters were included, the distribution of the testator's estate would have to be postponed till it could be ascertained how many legacies of the fixed amount would be payable.

So laid down in many authorities including *Garbrand* v. *Mayot* (1689) 2 Vern. 105; *Mann* v. *Thompson* (1854) Kay, 638; and *Rogers* v. *Mutch* (1878) 10 Ch. D. 25.

This rule will not, however, apply where the inconvenience has been obviated by a direction to set apart a fixed sum to answer the annuities as in *Evans* v. *Harris* (1842) 5 Beav. 45, or where, on the construction of the will the application of the rule is clearly negatived as in *Defflis* v. *Goldschmidt* (1816) 1 Mer. 417.

Appeal from Farwell J.

By his will dated October 21, 1936, the testator, William John Bellville, after appointing the plaintiffs executors and trustees thereof, and making various provisions which are not material, in clause 8 gave a number of pecuniary legacies, and continued: "I give to Mrs. Audrey Bellville the sum of "2000*l.* provided she has a son next in age to Jeremy Francis "Bellville born after my death . . . . and I direct that my "executors and trustees shall pay to any daughter or daughters "of my nephew Anthony Seymour Bellville who shall be "born after the date of this my will but who shall be born "before any further son born to my nephew Anthony Seymour "Bellville (such said son being the son next in age to my "nephew's present son Jeremy Francis Bellville) the sum of "10,000*l.* each for their sole and separate use and if at the "date of my death such daughters of Anthony Seymour "Bellville are infants then my trustees are to retain any

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"sums of 10,000*l.* which may be payable hereunder and to "pay the same over to the said daughter or daughters upon "their attaining the age of twenty-one years or marrying under "that age." The testator died on February 25, 1937. The testator's nephew, Anthony Seymour Bellville, was married once only, namely, to Audrey Bellville, and there had been issue of the marriage three children and no more, namely, the defendants, Belinda Jane Bellville, Jeremy Francis Bellville, and Camilla Audrey Bellville, who were born on March 29, 1930, November 22, 1931, and November 30, 1939, respectively. The plaintiffs took out a summons raising a large number of points with regard to the construction of the will, and, in particular, " whether the defendant, Camilla Audrey "Bellville, notwithstanding that she was conceived and born "after the death of the testator, became entitled on her birth "to a legacy of 10,000*l.*" Farwell J. held, on the construction of the will, that only daughters of Anthony Seymour Bellville who were born after the date of the will but during the lifetime of the testator were to take, and that, therefore, the daughter, Camilla Audrey, being conceived after the testator's death, was not entitled to a sum of 10,000*l.* The defendant, Camilla Audrey Bellville, appealed, asking that the decision of Farwell J. might be reversed and that it might be declared that Camilla Audrey Bellville " notwithstanding that she was "conceived and born after the death of the testator became "entitled on her birth to a legacy of 10,000*l.* under the "provisions of cl. 8 of the will."

Wynn Parry K.C. and *J. A. Wolfe* for the appellant. This is purely a question of the construction of a very erratic will but when it is read as a whole the true view is that the testator intended a daughter of Anthony Seymour Bellville to take under the class gift, even though she was not born till after his death. [After the matter of construction had been argued for a considerable time the Court raised the question whether the rule laid down in Hawkins on Wills, 3rd ed., p. 86, in a case where there was a gift of a fixed amount to each member of a class did not apply so as to exclude from taking a member

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of the class born after the death of the testator, and the hearing was adjourned for the consideration of the point by counsel. The hearing was resumed on May 27, 1941, when counsel continued :] In view of the authorities, and especially *Mann* v. *Thompson* (1) and *Rogers* v. *Mutch* (2), it is impossible to say that the rule of construction there laid down does not apply to exclude the appellant from the class entitled to take gifts of 10,000*l.* each. There remains the question whether there is anything in the words used by testator to enable the court to come to a different conclusion on the construction of this particular will, but, unfortunately, when clause 8 is considered in the light of *Rogers* v. *Mutch* (2), all its provisions can well be construed against the appellant. Therefore, no further argument will be offered in support of the appeal.

Romer K.C. and *Baden Fuller* for the residuary legatees. The rule applicable to the bequest to the daughters of Anthony Seymour Bellville is not a rule of law but a rule of construction which is stated clearly in Hawkins on Wills, 3rd ed., p. 86, where it is laid down that under a gift of a fixed sum to a class such as " a gift of 500*l.* to all and every the children of A. "payable at 21, children born after the testator's death and "before the eldest child attains 21 are included," but that, "if the gift be of 50*l.* each to all and every the children of A. "payable at 21, the children living at the testator's death "alone are entitled." The position, then, is that when a fixed sum is given for division among members of a class, however numerous they may be, the type of person specified will take although he is born after the testator's death, but that, when, as here, each member of a class is given a specified sum, the class closes as a matter of convenience in the administration of the estate at the death of the testator. That is the general rule and it is founded on cases going back to the 18th century : *Ringrose* v. *Bramham* (3). [Luxmoore L.J. A still earlier case is *Garbrand* v. *Mayot* (4.)] Later authorities are *Storrs* v. *Benbow* (5), where Lord Cranworth describes the rule as one of convenience, and *Townsend* v. *Early* (1). This rule was extended to cases where there were no members of the class living at the death of the testator in *Mann* v. *Thompson* (2) and *Rogers* v. *Mutch* (3). The language of the will may, however, sufficiently indicate a contrary intention as in *Defflis* v. *Goldschmidt* (4), but there is nothing in the will here to show such a contrary intention.

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(1) (1854) Kay, 638.
(2) (1878) 10 Ch. D. 25.
(3) (1794) 2 Cox. Eq. Cas. 384.
(4) (1689) 2 Vern. 105.
(5) (1833) 2 Myl. & K. 46; and on appeal (1853) 3 De G. M. & G. 390

Cur. adv. vult.

1941. May 29. The judgment of the Court (SCOTT, CLAUSON and LUXMOORE L.JJ.) was read by Luxmoore L.J.

LUXMOORE L.J. The late William John Bellville by his will dated October 21, 1936, among other provisions, directed his executors and trustees to pay to any daughter or daughters of his nephew, Anthony Seymour Bellville, who should be born after the date of his will, but before any further son of his nephew should be born, the sum of 10,000*l.* each for their sole and separate use. [His Lordship stated the facts set out above, and continued :] It appears from the judgment of Farwell J. that he accepted the argument addressed to him by counsel that, if the words of the gift " to any daughter "or daughters of my nephew Anthony Seymour Bellville who "shall be born after the date of this my will " had stood alone and with nothing else they would clearly include among the class to take the daughter, Camilla Audrey, as she was a daughter of Anthony and was born after the date of the will. The learned judge, however, went on to consider the rest of the will and found in it indications which, in his opinion, were sufficient to satisfy him that, on the true construction of the will, the testator had expressed his intention to confine the gift to daughters of Anthony born after the date of the will but before his death.

We are unable to accept the view that, if the words of the gift " to any daughter or daughters of my nephew Anthony

(1) (1860) 3 De G. F. & J. 11.
(2) (1854) Kay, 638.
(3) (1878) 10 Ch. D. 25.
(4) (1816) 1 Mer. 417.

"Seymour Bellville who shall be born after the date of my "will" had stood alone, Camilla Audrey Bellville would be qualified to receive a legacy of 10,000*l*. That view is, we think, contrary to a long line of authority to which the attention of the learned judge was not called and which has established that the rule which (as is stated in Hawkins on Wills, 1st ed., p. 73) "admits objects born after a testator's "death and before the period of distribution to share in a "bequest only applies when the total amount of the gift is "independent of the number of objects among whom it is to "be divided and is therefore not increased by the construction "adopted. But a gift of a certain sum to each of a class of "objects at a future period is confined to those living at the "testator's death. Thus under a gift of 500*l*. to all and every "the children of A payable at 21 children born after the "testator's death and before the eldest child attains 21 are "included, if the gift be of 50*l*. each to all and every the "children of A payable at 21 the children living at the testator's "death alone are entitled. (*Ringrose* v. *Bramham* (1); *Mann* "v. *Thompson* (2).) The reason given is that in the latter case "if after born children were admitted the distribution of the "personal estate of the testator would have to be postponed "till it could be ascertained how many legacies of the given "quantity would be payable." This passage was cited with approval by Jessel M.R. in *Rogers* v. *Mutch* (3). The rule has admittedly been recognized in many cases reported in the books, starting with *Garbrand* v. *Mayot* (4) and continuing through *Rogers* v. *Mutch* (3) in 1878 to the present time. A number of these cases are referred to in Halsbury's Laws of England, 2nd ed., vol. xxxiv., p. 278, note (*s*).

The rule, of course, does not apply when the inconvenience referred to by Mr. Hawkins in the passage quoted does not exist or is expressly contemplated by the testator. An example of the former exception is to be found in *Evans* v. *Harris* (5), when a fund was set apart out of which alone the

(1) 2 Cox. Eq. Cas. 384.
(2) Kay, 638.
(3) 10 Ch. D. 25, 27.
(4) 2 Vern. 105.
(5) (1842) 5 Beav. 45.

legacies in question were payable, and of the latter exception in *Defflis* v. *Goldschmidt* (1).

It follows that, in our opinion, the correct method of construing the gift in the present case is to consider whether there is anything in the testator's will to prevent the application of the rule, and that, if there is no sufficient indication of the testator's intention so to do, the duty of the court is to apply the rule. Farwell J., when considering the question from the point of view which ignored the existence of the rule, found sufficient in the will to prevent the operation of what he said was the clear meaning of the words, and, consequently, he held that the legacies of 10,000*l.* were given to daughters of the testator's nephew Anthony born after the date of the will but before the death of the testator. This part of his decision strongly supports the opinion at which we have arrived that there is nothing in the testator's will to exclude the operation of the rule, and we are, therefore, of opinion that the rule applies to the present case and that the appellant, Camilla Audrey Bellville, is not entitled to the legacy in question.

For these reasons we think the appeal fails and must be dismissed.

Appeal dismissed.

Solicitor: *Forsyte, Kerman & Phillips; H. B. Nisbett & Co.*

H. C. G.

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(1) 1 Mer. 417.

MORTON
J.

1941
April 7.

In re KAY AND LOVELL.

Ex parte THE TRUSTEE v. MOORE AND QUAIFE.

Bankruptcy — Partnership — Action for dissolution — Appointment of receiver—Two accounts of receiver certified and remuneration allowed —Bankruptcy of partners—Action transferred to judge in bankruptcy—Further accounts from receiver ordered—Jurisdiction of registrar to re-open accounts previously certified.

In October, 1938, M. was appointed receiver of a partnership in an action for dissolution. In April, 1939, Q. was appointed a receiver to act jointly with him. The master certified two accounts for M.'s remuneration, one from October, 1938, to January, 1939, and the other from that date until the appointment of Q., and allowed the remuneration. In April, 1940, a consent order declared the partnership dissolved from the date when the writ in the action was issued, and receiving orders were made against the partners in April, 1940, and May, 1940. In July, 1940, the action was transferred to the judge sitting in bankruptcy, and the receivers were ordered to give up possession to the trustee in bankruptcy and to bring in their accounts for assessment by the registrar. The trustee in the bankruptcy contended that, under the order of July, 1940, the registrar ought also to reconsider the remuneration already allowed to M. The registrar, however, took the view that the order did not direct him to re-open previously certified accounts, and that the trustee must apply to the judge in bankruptcy. M. and Q. likewise took that view, and contended also that the court had no jurisdiction to direct the re-opening of the accounts. No application was made to vary or discharge the master's certificate:—

Held (1), that the order did not, on its true construction, direct the re-opening of the accounts: (2) that, as there was no application to vary or discharge the certificates, the court had no jurisdiction to re-open them and re-assess the remuneration.

In re Van Laun [1907] 1 K. B. 155; [1907] 2 K. B. 23, distinguished.

MOTION.

By this motion the trustee in bankruptcy of Henry James Kay and Clifford Percy Lovell asked for an order that the registrar, when assessing, under an order of the court of

July, 1940, the remuneration of Sir Harold John de Courcy Moore and Albert Edward Quaife, joint receivers in the bankruptcy since April, 1939, should re-consider and re-assess remuneration already allowed to Sir Harold Moore on certificates in respect of two consecutive periods before that date during which he was sole receiver.

Kay had started a partnership action claiming dissolution of the partnership against Lovell in October, 1938. On October 18, 1938, Sir Harold Moore was appointed receiver and manager, and on April 18, 1939, Mr. A. E. Quaife was appointed to act jointly with him. Sir Harold Moore rendered accounts in the partnership action for the respective periods October 18, 1938, to January 1, 1939, and January 2 to April 17, 1939, and the master allowed and certified Sir Harold Moore's remuneration for those periods. For the first period the master made his certificate on July 28, 1939, which was filed on July 29, 1939, and as regards the second period he made his certificate on June 27, 1940, which was filed on June 28, 1940. On April 8, 1940, an order was made by consent that the partnership be treated as dissolved as from the issue of the writ. On April 30 and May 4, 1940, receiving orders were made against Lovell and Kay respectively, and on July 3, 1940, the applicant was appointed trustee in bankruptcy of both. On July 31, 1940, Morton J., on motion by the trustee, ordered that the partnership action be transferred to the judge in bankruptcy and that the receivers give up possession to the trustee and bring in their accounts, and that the same be taken and passed and the receivers' remuneration assessed by one of the registrars, and thereupon the receivers be discharged.

The registrar, by an application on February 11, 1941, was asked to take and pass the receivers' accounts directed by the order of July 31, 1940, to be taken and passed and to assess their remuneration: but, while there was no dispute that he should take the accounts which had been brought in by the receivers covering the period from April 18, 1939, onwards, he declined to reconsider the remuneration already allowed to Sir Harold Moore, holding that the order did not so direct him, and that if the trustee desired him to re-open those accounts the trustee should apply to the judge for an order giving the necessary directions. The trustee now moved for an order so directing the registrar. There was no application to vary or discharge the master's certificate.

Kingham for the trustee. The order sought on this motion ought to be made. Under the terms of the order of July 31, 1940, the registrar ought to go into the two accounts again, although the master made his certificates after they were filed, and to re-consider Sir Harold Moore's remuneration although the master allowed it. The wording of the order of July 31, 1940, follows that of the order in *In re Parker and Parker* (1). On that wording the registrar can, and ought to, proceed in accordance with the order which the court is now asked to make.

The principle laid down by Bigham J. in *In re Van Laun* (2), and affirmed by the Court of Appeal, is stated in the headnote to the report of the decision of the Court of Appeal in the following terms: "No judgment recovered against the "bankrupt, no covenant for payment given by or account "stated with him, can deprive the trustee in bankruptcy "of his right and duty to investigate the nature and grounds "of the claim made against the bankrupt's estate: the trustee "is therefore entitled to go behind these forms and to require "satisfactory evidence that the debt on which the proof is "founded is a real debt." In *In re Home and Colonial Insurance Co.* (3) Maugham J., as he then was, held that that principle was settled law, and followed it. The court ought to apply it to the present case. The master allowed far too much remuneration, and the two accounts ought to be re-opened and the remuneration re-assessed.

W. A. L. Raeburn for the receivers. The order sought on this motion ought not to be made. On behalf of the receivers, three points are taken against the motion. First, the motion proceeds on a wrong interpretation of the order of July 31,

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(1) (1884) 1 Morrell, 39.

(2) [1907] 1 K. B. 155, 162, 163; 2 K. B. 23.

(3) [1930] 1 Ch. 102, 130, 131.

1940. The words of the order cannot refer to accounts brought in by one receiver, Sir Harold Moore, in respect of the period when he was sole receiver, or to accounts already brought in and certified by the master.

Secondly, on this application the Court has no jurisdiction to re-open accounts already certified in the partnership action by the master's certificates, which have become binding: see Order LV., rr. 70, 71 (1).

Thirdly, an application to discharge or vary the certificate dealing with Sir Harold Moore's first account could not possibly succeed. That certificate, filed on July 29, 1939, became binding long before the date to which the title of the trustee in bankruptcy relates back. Thus, the remuneration of Sir Harold Moore has been claimed and allowed out of a fund in which the trustee has not, and had not, any interest. Also a like application with regard to the second account could not possibly succeed. Sir Harold Moore certainly had a right to some remuneration. On December 14, 1939, the master fixed the amount of it, which Sir Harold Moore was thereafter entitled to retain. The master's certificate bars any proceedings with regard to the remuneration fixed by him. If that argument is wrong, Sir Harold Moore has a first charge on the property for his remuneration, and the trustee must take the property subject to that charge.

Kingham in reply. It is not conceded that a similar application with regard to the second account could not succeed. So to hold would be to go entirely against the principle laid down in *In re Van Laun* (1) and followed in *In re Home and Colonial Insurance Co.* (2).

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(1) Rule 70: "Every certificate "with the accounts (if any) to be "filed therewith, shall be transmitted by the master to the "central office to be there filed, "and shall thenceforth be binding "on all the parties to the proceedings unless discharged or varied "upon application by summons "to be made before the expiration of eight clear days after the "filing of the certificate: provided "that the time for applying to "discharge or vary certificates, to "be acted upon by the Paymaster-"General without further order, "or certificates on passing "receivers' accounts, shall be "two clear days after the filing "thereof."

Rule 71: "The judge may, if "the special circumstances of the "case require it, upon an application by motion or summons "for the purpose, direct a certificate to be discharged or varied "at any time after the same has "become binding on the parties."

MORTON J. [after stating the facts above summarized:] In answer to the present application, Mr. Raeburn, for the receivers, takes three points. First, he submits that this motion proceeds on the wrong interpretation of my order of July 31, 1940. With regard to the wording of that order Mr. Kingham, for the trustee, tells me, and I of course accept it, that at the hearing on July 31, 1940, he referred me to *In re Parker and Parker* (3), and that the wording of the order followed the wording of the order in that case. I do not doubt that is so, but Mr. Raeburn draws attention to the fact that my order directs that the receivers should bring in their accounts and that the same be taken and passed and the receivers' remuneration assessed by Mr. Registrar Kean. He says that these words cannot refer to accounts of one receiver, namely, Sir Harold Moore, in respect of the period when he was sole receiver, and cannot refer to accounts already brought in and certified by the master.

In my view, when I made that order, although I cannot charge my recollection as to what was in my mind when I did so, I cannot have intended to include in the scope of the order accounts which had been lodged by Sir Harold Moore, which had been vouched before the master, and in respect of which he had in fact made his certificate. Apart from the question of the use of the plural in that order, to which I do not in the circumstances attach very much importance, I do not think that that wording would have been employed if it had been intended that Mr. Registrar Kean should re-open accounts already dealt with by Master Willmott, which formed the subject of two certificates by Master Willmott.

The result is that, so far as my order of July 31, 1940, is concerned, in my judgment it does not direct Mr. Registrar Kean to take the account which was delivered by Sir Harold

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(1) [1907] 1 K. B. 155, 162, 163; 2 K. B. 23.

(2) [1930] 1 Ch. 102, 130, 131.

(3) (1884) 1 Morrell, 39.

Moore in respect of the period from October 18, 1938, to January 1, 1939, or the period from January 2, 1939, to April 17, 1939.

Mr. Raeburn argued secondly that the court on the present application has no jurisdiction to re-open accounts already certified in the partnership action by two certificates which have become binding. He referred me to the terms of Order 55, rr. 70, 71. [His Lordship read the rules and continued:] It is manifest, as far as r. 70 is concerned, that the certificates in question became binding upon all parties at the expiration of the period stated. As regards r. 71: For the purposes of this part of my judgment I shall assume, without deciding the matter, that it was open to the trustee in bankruptcy to apply to this court for an order discharging or varying either or both of the certificates to which I have referred. There is not before me, however, a motion or summons to discharge or vary the certificates. I think Mr. Raeburn is right in saying that on the present application I have no jurisdiction to make any order which would in effect be an order re-opening the accounts already dealt with in the master's certificates and re-opening the question of the remuneration which the master allowed to Sir Harold Moore in respect of the two periods which I have mentioned.

Mr. Kingham referred me to the case of *In re Van Laun* (1), which was decided by Bigham J. (as he then was). In that case the learned judge said "The trustee's right and duty when "examining a proof for the purpose of admitting or rejecting "it is to require some satisfactory evidence that the debt "on which the proof is founded is a real debt. No judgment "recovered against the bankrupt, no covenant given or account "stated with him, can deprive the trustee of this right. "He is entitled to go behind such forms to get at the "truth, and the estoppel to which the bankrupt may "have subjected himself will not prevail against him." The decision in that case was affirmed by the Court of Appeal.

Mr. Kingham also referred me to the judgment of Maugham J.

(1) [1907] 1 K. B. 155, 162, 163; 2 K. B. 23.

(as he then was) in *In re Home and Colonial Insurance Co.* (1). I, of course, accept the principle laid down in the cases referred to, but in my view they have no application to the point that I have to decide under this portion of the argument, namely, whether on this application I can give the direction asked for by the trustee.

I have carefully refrained from expressing any view as to the merits of the case, whether the very substantial remuneration allowed by the master was excessive, as is suggested by Mr. Kingham, for the trustee. I do not think it would be right for me to say anything on that matter on the present application.

The third argument of Mr. Raeburn was that, at any rate as to the first account delivered by Sir Harold Moore, which was dealt with by the certificate filed on July 25, 1939, no application to discharge or vary that certificate could possibly succeed, because the certificate was made and filed and became binding some considerable time before the date to which the title of the trustee in bankruptcy relates back. Thus, he says, the receiver's remuneration has been claimed and allowed out of a fund in which the trustee in bankruptcy has and had no interest.

As to the second account, dealt with by the second certificate, Mr. Raeburn also submits that no application to discharge or vary that certificate could possibly succeed. He says that the receiver had a right to some remuneration, and that the amount was determined by the master, who fixed the remuneration on December 14, 1939, and the receiver was entitled thereafter to retain the remuneration fixed by the master. The certificate, he says, is a bar in the way of any proceedings in regard to the remuneration the master fixed. Alternatively, he contends that the receiver has a first charge on the property for his remuneration, and the trustee must take the property subject to that charge.

As there is no motion to discharge or vary the certificate before me, I shall say no more than this: that I find it very difficult to see, at the moment, any answer to Mr. Raeburn's

(1) [1930] 1 Ch. 102, 130, 131.

argument with regard to the first account and the first of the two certificates. As to his argument with regard to the second account and the second certificate, I do not propose to make any comments, one way or the other, because I think that it would not be right to do so in the circumstances of the case. That is an argument which was strenuously contested by Mr. Kingham and an argument which may have to be considered hereafter.

The result is that this motion fails and must be dismissed with costs.

Solicitors: *C. R. Enever & Co; Constant & Constant.*

K. R. A. H.

SIMONDS J.

1941

May 29; June 13.

In re KNAPTON.

KNAPTON *v.* HINDLE.

Will—Allocation of subject-matter of bequest—Bequest of a house to each of a class of persons and individuals—Right of choice—No allocation of any house to any person—Allocation by lot in default of agreement between members of class.

A testatrix bequeathed " one house to each of my nephews and " nieces and one to N. H. One to F. K. One to my sister. One " to my brother " :—

Held (1.), that the right of choice should go in the first place to the persons benefiting as " nephews and nieces " and afterwards to the other persons in the order in which they were named.

Duckmanton v. *Duckmanton* (1860) 5 H. & N. 219 and *Asten* v. *Asten* [1894] 3 Ch. 260 followed.

(2.) that in the event of disagreement among the nephews and nieces, the choice among them was to be determined by lot, in accordance with the analogy of Roman law: Institutes of Justinian, Book II., title 20, s. 23.

ADJOURNED SUMMONS.

The testatrix, Annie Knapton, made her will on May 31, 1935, and died on February 5, 1939, being then possessed of several small houses. There survived her a brother, Frank Knapton, whom she appointed trustee of her will, a sister, Mary Hindle, a nephew, Harry Knapton, and two nieces, Annie Robinson and Edith Knapton. By her will she provided (inter alia): " I give and bequeath my estate "as follows :—My property, 253, Great Horton Road, for a "Women's Institute for Great Horton. Single women first "except for one married lady, Mrs. Hindley of Bank Top, the "Tenant Mrs. Benson to be offered my house at 1, Farnham "Road, when this plan can be made feasible. One house to "each of my Nephews and Nieces and one to Nellie Hind. One "to Florence Knapton. One to my Sister. One to my Brother."

On August 16, 1940, Frank Knapton took out a summons to determine (inter alia) whether the gifts of the houses failed for uncertainty and, if not, asking that directions might be given as to the manner in which they should take effect.

Sir Norman Touche for Frank Knapton.

R. Gibson for persons interested in the gifts of houses. The gifts are good and not void for uncertainty. The testatrix must have contemplated the selection of these houses by the devisees, one house to each of them, in the order in which she named them in her will, the nephew and nieces in the first place and then the named devisees: *Duckmanton* v. *Duckmanton* (1); *Asten* v. *Asten* (2). In the case of the nephew and the nieces the choice should be by lot: Institutes of Justinian, Book II., title 20, s. 23.

W. Waite for Mary Hindle. Since the testatrix has not indicated which devisee is to take any particular house nor which is to have the first choice, the gift is void for uncertainty. Even if it be allowed that the right of choice should ordinarily go to the devisees in the order in which they are named, this cannot apply to a gift of "one house to each of my nephews "and nieces" which must be void because it does not name them in any order.

The words of the Institutes of Justinian do not cover this devise and in any event Roman law cannot apply. The court is not entitled to follow the rules of the civil law unless the point is not covered by English law, and by English law this gift is void for uncertainty. It was never recognized in English law that anything should be decided by lot.

Danckwerts for the Attorney-General.

SIMONDS J. [having stated the facts:] The testatrix has not indicated which house is to go to which devisee nor who is to have the first choice of a house. Accordingly, it has been argued on behalf of the next of kin that the devises are void for uncertainty. Apart from the initial difficulty which arises out of the devise of "one house to each of my nephews "and nieces," I have little difficulty, upon the authority of cases decided in this court, in holding that the gift is a good one and that choice is given to the several devisees in the order in which they are named. Authority for that will be found first in *Duckmanton* v. *Duckmanton* (1). The side note sets out that the testator, "J. D. being seised in fee of two "freehold closes of land in R., by his will devised to his son

(1) (1860) 5 H. & N. 219.

(2) [1894] 3 Ch. 260.

"John one freehold close of land in R., and to his son George "one freehold close of land in R. John was the testator's "heir-at-law. After the death of the testator John and "George tossed up for choice and George won.—*Held*, that "the devise to John was not void for uncertainty, and that "the case was one for election." In the decision of that case Pollock C.B. said (1): "It was admitted that, if he" —that is the testator—" had devised one to John and said "nothing as to the other, the devise would have been good. "So, if he had devised one to George, it would in like manner "have been a good devise. But he devised one to each, and "it is said that the devise must therefore mean nothing; "I cannot understand that. We have not to decide whether "John or George was the person who had a right to elect. "John cannot be in a better situation because he has elected." Martin B. carried the matter a little further because he said this (2): "The testator has in clear terms said, 'I devise " 'to John Duckmanton and his heirs one freehold close of " 'land.' He had two such closes. If he had said, 'I give " 'one close to John and his heirs,' it is admitted that the "devise would have been good. So, if he had said, 'I give " 'one close to John and the other to George,' it is admitted "that the devise would have been good. Does the testator "by his will say, 'I wish John to have one field and George " 'the other'? Surely it is no strained construction to say "that it means, 'I wish John to have one close and the other "'close to go to George.' On the point of election I have some "doubt. But it does not arise upon this rule. My idea of "election is that it is exercising a choice, not trusting to "chance." Then Watson B. said (3): "It is clear that he "intended both to pass by his will. It is said that this "construction is at variance with the case of *Richardson* v. "*Watson* (4). That is not so. There it was proved that there "were two closes answering the description in the will, and "it was uncertain what passed. The word 'close' means "one close, and there was nothing to show upon what the

(1) 5 H. & N. 222.
(2) Ibid. 223.
(3) 5 H. & N. 224.
(4) (1833) 4 B. & Ad. 787.

"gift was to operate. But here both closes were in Ridgway "Field, and on the face of the will the testator devises both. "Why should there not be an election here? The uncertainty "is, who is to make the election. It may be the person first "named in the will, who takes both by devise and as heir "at law. We are not embarrassed by the mode in which "the election took place." Now that case is not an express decision that the right of selection is in order of priority of name, but in *Asten* v. *Asten* (1) Romer J. said: "A testator "who has several properties, all having the same description, "may by his will give one of them to a legatee, and leave the "choice of that one to the legatee; and such a gift is clearly "valid. And the fact that the legatee is to be able to select "may appear either by express words used in the will, or "by reasonable inference from it. And, prima facie, if the "testator gives one of such properties to a legatee without "saying more, then the reasonable inference is, that the "testator intended the legatee to select; and this whether "the fact appears on the face of the will that the testator "had several such properties, as in *Duckmanton* v. *Duckmanton* (2) or whether the fact otherwise appears, as in "*Tapley* v. *Eagleton* (3). And I should myself be prepared "to hold that, where a testator gives one of such properties "to each of several legatees, then he intends (prima facie) "to give the right of selection to the legatees according to "the priority of the bequests." That is authority sufficient for me to come to the conclusion that here the devises in favour of the named or described persons are valid, and that the right of selection is given to the several devisees in the order of their names.

The matter, however, is complicated by this, that the initial devise is "One house to each of my nephews and "nieces." There were in fact one nephew and two nieces and it is said, and said justly, that the rule that I have indicated can have no application where there is a gift of that character; for no nephew or niece is named; therefore,

(1) [1894] 3 Ch. 260, 262.
(2) 5 H. & N. 219.
(3) (1879) 12 Ch. D. 683.

priority cannot be given in order of name. When the matter was before me at the end of last term, it occurred to me, from a rather hazy recollection, that there was something in the civil law which might perhaps be of some assistance, for it is the fact that a large part of our law in regard to testamentary dispositions is taken from the civil law. Accordingly, I adjourned the case in order that a search of the matter might be made by learned counsel.

The result of their research has been to show that in the Roman law at least an analogy, if nothing more, is to be found in the Institutes of Justinian, Book II., title 20, s. 23. The passage in the Latin text is conveniently set out in Moyle's Imperatoris Justiniani Institutionum, 5th ed., p. 299. I read the English translation from Hunter on Roman Law, 3rd ed., p. 927: "A legacy at a man's option—that is, "where the testator had ordered the legatee to choose from "among his slaves or other property—involved in itself a "condition; and therefore unless the legatee himself made "the choice in his lifetime, he did not transmit the legacy "to his heir. But under our constitution this, too, has been "remodelled and put on a better footing; and full leave has "been given the legatee's heir to choose, although the legatee "has not done so in his lifetime. As greater diligence, too, "has been used in handling the matter, this addition has "been made in our constitution:—if there are several legatees "to whom the option is left, and they differ as to the choice "of the object, or if one legatee has several heirs, and they "differ among themselves about choosing, and one desires "to choose one object, another another,—then, that the "legacy may not be lost (the rule brought in by most of "those learned in the law, contrary to all good feeling), "fortune is to be judge of the choice, and the case is to be "finally settled by lot, so that the opinion of him to whom "the lot comes is to prevail in the choice." If the devise here had been not "One house to each of my nephews and "nieces" followed by the devise of one house to Nellie Hird and one house to another devisee, but had been a devise of "One house to my nephews and nieces as joint tenants" then that passage from the Civil Law which I have read would have afforded a clear and precise analogy and I should have had no difficulty in saying that, if those nephews and nieces were unable to agree in their choice of the house devised to them, then, in order that the devise might not be lost, fortune was to be judge of the choice and the case was to be determined by lot. I think that I ought to apply the same principle here. The clear intention of the testatrix was that her nephew and nieces were each to have a house. I think it is equally clear on the principle of the cases decided in this court that each of them was to have a choice in priority to those devisees named later in the will. Accordingly, I construe this as a devise of: " A house to each of my nephews "and nieces, a house to Nellie Hird; and my nephews and "nieces are to have a choice before Nellie Hird." Now how are they to choose? If they cannot agree then by the principle of the Roman law the choice must be determined by lot. No case has been brought to my notice in which the contrary has been decided. It could not, I think, be suggested that the determination of choice by lot is in any way contra bonos mores or that that principle of determination is not one which is well known. Remembering what a large part in the development of our testamentary law has been played by the civil law, I see no difficulty in these circumstances in applying that principle in the event of the devisees being unable to agree.

Accordingly, I shall declare that the several devises of one house each are valid and that the right of choice is to go in the first place to the nephew and two nieces as they agree; or in the event of disagreement as determined by lot, with liberty to apply as to the determination by lot, in the next place to Nellie Hird, next to Florence Knapton, next to Mary Hindle, the testatrix's sister, and last to Frank Knapton, her brother. The ordinary rule will apply that they take subject to any mortgage.

Solicitors: *Long & Gardiner, for Browning & Oliver, Bradford; Official Solicitor; Treasury Solicitor.*

F. C.

SIMONDS
J.
1941
June 17.

In re ROBBINS.

MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED *v.* MELVILLE.

Will—Settled shares—Two tenants for life—" Periodical payments in " nature of income current " at death of testator not apportionable—Undrawn profits—Power to trustees to carry on business of testator—Death of one tenant for life—Business carried on by trustees with his executors—Title of surviving tenant for life to profits.

By his will a testator settled his residue in equal half shares, his son, W., being tenant for life of one, and his brother, A., of the other. Clause 13 provided: " . . . . I . . . . declare that " rents, dividends and other periodical payments in the nature of " income current at the date of my death shall not be apportion- " able, but that the same and also all such income accrued but not " received at the date of my death shall be treated as income and " not as capital." Clause 14 provided: " With regard to any " business . . . . in which I may be interested whether solely " or jointly with anyone else . . . . my trustees shall have all " such powers as would be possessed by a single person absolutely " entitled as regards the mode and time of realization of any such " business . . . . or my share or interest therein or otherwise " in relation thereto . . . . My trustees may . . . . continue " . . . . any such business . . . . with power to enter into any " new arrangement or agreement with any person . . . . with " whom at my death I may have been carrying on any such " business . . . . either in partnership or otherwise . . . . and " to retain or employ in any such business . . . . such part of my " residuary estate . . . . as my trustees may . . . . think " proper."

The testator owned theatres in an oral partnership at will in equal shares with his brother, F., the accounts of the business being made up to December 25 in each year, December 26 to December 25 thus being the conventional period for ascertaining the profits. The testator and F. left most of their shares of the profits in their capital accounts. The testator died on February 28, 1937. At that date there were standing to his credit in the accounts sums representing undrawn profits from December 26, 1935, to December 25, 1936. After the testator's death his trustees carried on the business on the same terms with F., who died on April 5, 1938, and thereafter with F.'s executors. A. died in March, 1938. W., the surviving tenant for life, claimed to be entitled to the profits for the periods from December 26, 1935, to December 25, 1936, and from December 26, 1936, to February 28, 1937. The children of A., the deceased tenant for life, claimed that the profits of the business as at A.'s death should be apportioned in respect of the share of income settled on A. for life :—

Held, (1.) that, although the partnership ended when the testator died, the profits for the conventional period during which his death occurred were to be computed at the end of that period, namely, as at December 25, 1937, and that, as the business was carried on after the testator's death in accordance with his directions, so that there was one continued business, all the profits for that conventional period were income and went to W. ; (2.) that the undrawn profits for the conventional period from December 26, 1935, to December 25, 1936, were capital, as the will did not otherwise provide, and therefore did not go to W. ; (3.) that A. was not entitled to any of the profits for the conventional period, during which he died, ending December 25, 1938, all of which would go to W.

Browne v. *Collins* (1871) L. R. 12 Eq. 586 ; *Jones* v. *Ogle* (1872) L. R. 8 Ch. 192 ; *Lambert* v. *Lambert* (1874) 22 W. R. 359, and *In re Cox's Trusts* (1878) 9 Ch. D. 159, applied.

ADJOURNED SUMMONS.

The testator, Walter Emm Melville Robbins, by his will dated July 21, 1932, devised his real estate and bequeathed the residue of his personal estate to his trustees on trust to sell with power to postpone the sale at their discretion or to retain the same or any part thereof in its existing form of investment. He directed them to hold the residue of the moneys arising from the sale on trust for such of them his son, Walter Lloyd Melville, and his brother, Andrew Melville, as survived him, and that the shares of those two legatees should not vest in them absolutely but should be held on certain trusts for their benefit. Clause 13 of the will provided : "I declare that all "income produced from every part of my residuary estate "previously to the sale and conversion thereof shall be applied "in the same manner in all respects as if the same were income "from investments hereby authorised . . . . And I further "declare that rents, dividends and other periodical payments "in the nature of income current at the date of my death shall "not be apportionable but that the same and also all such "income accrued but not received at the date of my death "shall be treated as income and not as capital." Clause 14 provided : "With regard to any business or undertaking in "which I may be interested whether solely or jointly with

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"anybody else I declare as follows: (i.) My trustees shall "have all such powers as would be possessed by a single person "absolutely entitled as regards the mode and time of realisation "of any such business or undertaking or my share or interest "therein or otherwise in relation thereto. (ii.) My trustees "may, if they think proper continue or concur in continuing "any such business or undertaking for such period and upon "such terms in all respects as they shall think fit with power "to enter into any new arrangement or agreement with any "person or persons with whom at my death I may have been "carrying on any such business or undertaking either in "partnership or otherwise as my trustees shall consider "desirable and to retain or employ in any such business or "undertaking such part of my residuary estate (whether in "excess of my capital or share of capital engaged therein at "my death or not) as my trustees may from time to time think "proper."

The testator died on February 28, 1937. At his death he was carrying on certain theatrical enterprises in partnership with his brother Frederick Emm Melville Robbins, being the joint owner with his brother of two freehold theatres in London, the Lyceum and Prince's. The testator's interest in these theatres constituted the principal asset of his estate. The testator and his brother managed the theatres as partners in equal shares, there being no partnership articles but merely an oral partnership at will. After the testator's death his executors continued with the testator's brother or, since the latter's death on April 5, 1938, with the brother's executors, the partnership business on the same terms as before, pursuant to the power in that behalf conferred on them by cl. 14 of the will. During the lifetime of the testator and his brother they drew only a small part of their shares of the profits of the business, the rest of those profits being left by them in the business and appearing in the accounts thereof as moneys standing to the capital accounts of the partners. The accounts of the business were made up to December 25 in each year, that being, therefore, the conventional period in which the profits or losses of the partnership were ascertained. The accounts of the business showed that there were standing to the credit of the testator as capital at December 25, 1936, sums of 10,051*l.* 8*s.* 4*d.* and 1237*l.* 4*s.* 5*d.* in the Lyceum and Prince's Theatres' accounts respectively which represented undrawn profits of the testator for the period from December 26, 1935, to December 25, 1936. It further appeared that the testator's half share of profits of the Lyceum and Prince's Theatres from December 26, 1936, to February 28, 1937, amounted to 7504*l.* 2*s.* 8*d.* and 1401*l.* 15*s.* 9*d.* respectively.

Questions arose, as between the persons entitled in succession to the testator's residuary estate, with regard to the profits of the business both before and after his death. Walter, the surviving tenant for life, claimed to be entitled to the profits both from December 26, 1935, to December 25, 1936, and for the broken period from December 26, 1936, to February 28, 1937. The children of Andrew, the deceased tenant for life, claimed an apportionment of the profits of the business as at Andrew's death in respect of the share of income settled on Andrew for life. Accordingly, the trustees of the will asked, by this summons, (1.) whether there was included in cl. 13 of the will, and should be treated as income of the estate, in addition to that current and accruing at the testator's death—(*a*) only income payments received since the death, payable in respect of a period ending before the death, but not actually due and payable at the death, or (*b*) not only those, but also income payments actually due and payable before the death, but not yet received at its date; (2.) whether the testator's share of profits in the business for the period from December 25, 1936, to February 28, 1937, should be treated as income or capital; (3.) for directions on the effect of cl. 13 on moneys in the nature of income received after the testator's death, being wholly or partly in respect of periods which had wholly or partly expired before the death; and (4.) whether, in respect of the share of income settled on Andrew for life, there should be any apportionment of the profits of the business as at his death.

Hunt for the trustees.

Jennings for the surviving tenant for life and one of the administrators of the estate of the deceased tenant for life. The profits to December 25, 1936, should go to the surviving tenant for life. They were "periodical payments in the "nature of income" current at the testator's death, and under cl. 13 of the will are expressly not apportionable, but are to be treated as income. The profits from December 26, 1936, should be ascertained as at December, 25, 1937. Here, again, there should be no apportionment, but all should go to the surviving tenant for life: Gover on Capital and Income, 3rd ed., p. 30: *Browne* v. *Collins* (1); *In re Cox's Trusts* (2). Those two authorities amply justify the submission that in cases of this kind there cannot be any apportionment of the profits. If that is not so on the general law, it must be so on the latter part of cl. 13: *Jones* v. *Ogle* (3). Lastly, there should be no apportionment in favour of the deceased tenant for life of the profits accruing during the period from December 26, 1937, to December 25, 1938, during which he died. All those profits should go to the surviving tenant for life.

Myles for children of the deceased tenant for life and for a trustee of deeds settling and varying the settlement of the interests under the testator's will of a child who did not appear. All the profits from December 26, 1935, to December 25, 1936, are capital. That is so on the general law, unless the will expressly makes them income, which it does not. As at the death of the testator on February 28, 1937, there should be an apportionment of the profits of the partnership business. As from that date, all the moneys are capital and none of them income, because there were no more profits of the partnership. The partnership, which was a very simple form of partnership at will, ended with the testator's death. If that submission is not accepted, it is submitted that these profits are not "periodical payments in the nature of income": *In re Cox's Trusts* (2). It cannot properly be said that a share of profits comes within cl. 13 of the will.

Jennings in reply. Part of the argument for the children

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(1) (1871) L. R. 12 Eq. 586.
(2) (1878) 9 Ch. D. 159.
(3) (1872) 8 Ch. D. 192.

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of the deceased tenant for life is founded on the fallacy inherent in assuming, as it does, that, because a partnership is dissolved on the death of a partner, the business immediately ceases and no more profits are made. That is not so. Invariably the business is carried on by the executors and the surviving partner or partners without a break. The cases establish that, when the business is continued for the conventional period, the profits are deemed to accrue on the last day of that period. That is so whether the business is a partnership, as in *Browne* v. *Collins* (1), or the enterprise of one individual, as in *In re Cox's Trusts* (2).

SIMONDS J. [after stating the facts substantially as hereinbefore set out:] For the period up to December 25, 1936, the surviving tenant for life founds himself solely on the language of the will, but for that from December 26, 1936, to the death of the testator on February 28, 1937, he founds himself, not only on the language of the will, but also on the general principle of law for which he relies on such cases as *Browne* v. *Collins* (1). I will deal first with the period from December 26, 1936, to the death of the testator. The general law is conveniently stated in "Capital and Income," by the late Mr. Gover, 3rd ed., p. 30, where the learned author is dealing with the Apportionment Act, 1870, and says: "Profits of a private business or partnership are not apportionable under the Act (*Jones* v. *Ogle* (3)), but must be taken "as having accrued entirely at the end of the period for which "they are declared, and not before." For that he relies on *Browne* v. *Collins* (1) and *Lambert* v. *Lambert* (4). He goes on: "and if the life tenant dies before the expiration of that "period, they belong to the next life tenant or remainderman "then in possession." He cites *In re Cox's Trusts* (2) for that. "Delay in ascertaining the profits does not affect the rights "of the parties interested: (*Browne* v. *Collins* (1)); but where "the partners have power to capitalise profits, there may be a "question whether the omission to divide the profits is due to "an intention to capitalise: . . . ."

(1) L. R. 12 Eq. 586.
(2) 9 Ch. D. 159.
(3) L. R. 8 Ch. 192.
(4) 22 W. R. 359.

In the present case the executors continued to carry on the business which the testator had theretofore carried on in partnership with his brother. The accounting period of the business was from December 26 to December 25 in the following year. Accordingly, the accounting period with which I am primarily concerned in this part of the case was from December 26, 1936, to December 25, 1937, which embraced two months or so of the testator's life and ten months after his death. It appears to me that, applying the principle stated in the text-book which I have read, the line must be drawn not at the death of the testator, as the accountants have drawn it, but at the end of the accounting period, for it is only then that it can be discovered whether the business made a profit for the relevant period. Therefore, I propose to declare, that the tenant for life became entitled, not to the profits somewhat arbitrarily ascertained for the period from December 26, 1936, to February 28, 1937, but to the whole of the profits for the period from December 26, 1936, to December 25, 1937. It is suggested that that is not a proper principle to apply, because the partnership was a partnership at will, carried on under an oral agreement, so that, under the Partnership Act, it was automatically dissolved on the death of the testator, and, accordingly, there is no room for saying that anything which had accrued by way of profits down to the testator's death could be regarded as a profit, but it must be treated as part of the capital of the estate. I do not think that that is the correct way of looking at the situation where the business is carried on under the direction of the testator, so that there is one continuous period in which it is conducted, first by the testator, and then by the executors under his directions. It seems to me proper, in such a case, to apply the principle which I have stated, and to treat the whole of the income for the conventional period as belonging to the person who is living at the expiration of that period.

In coming to that conclusion, I do not rely in the least on the terms of the will. But, with regard to the period before the testator's death, that is to say, the conventional period

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which expired on December 25, 1936, there can be no doubt on general principles that the profits undrawn for that period are capital of the testator's estate, unless there is something in his will which provides for a different destination. I, therefore, turn again to the terms of the will, to see whether there is anything which affects the position. Counsel for the tenant for life has founded on a passage in cl. 13, namely, the declaration that "rents, dividends and other periodical "payments in the nature of income current at the date "of my death shall not be apportionable, but that the "same and also all such income accrued but not received "at the date of my death shall be treated as income and not as "capital." Counsel contends that the profits accruing before December 26, 1936, which were subsequently ascertained but had not been received by the testator at the date of his death, fall within that declaration. I think it is quite clear that, unless there is some special context, the words which I have read are not apt to carry the profits of a partnership. That, indeed, is stated in the passage in Gover which I have already read, and is clear on the authority of *Jones* v. *Ogle* (1), the case which the learned author cites. If that is so, this clause cannot assist the tenant for life, unless there is some context which enables me to give the words some special meaning, and I can find nothing, either in the succeeding clause, in which he deals with any business or undertaking in which he may be interested, or elsewhere in the will, which would justify me in saying that the testator intends these words to cover the profits of the partnership, which, by their nature, are not "periodical payments in the nature of income." Accordingly, I must decide against the claim of the tenant for life so far as it relates to the profits which had accrued and were subsequently ascertained and carried to his account for the period ending December 25, 1936.

A further question has been raised. The tenant for life of one share, Andrew, died in March, 1938, and the executors of the testator continued to carry on the business and were carrying it on at the end of the conventional period expiring

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(1) L. R. 8 Ch. 192.

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on December 25, 1938. Applying the principles which I have already applied, it is clear that Andrew is not entitled to any part of the profits for that conventional period relating to the months between December, 1937, and March, 1938. The whole of the profits for that period, when they have been ascertained, will go to the person entitled as at December 25, 1938.

[The order contained declarations, in answer to questions 1, 2 and 3 of the summons, that the share of the testator, or of his estate, in the profits for the period from December 26, 1936, to December 27, 1937, formed part of the income of his estate, notwithstanding that he died during that period, but that his share for the period ending December 25, 1936, which remained to his credit at his death, formed part of the capital of his estate, and, in answer to question 4, that there ought to be no apportionment, under the Apportionment Act, 1870, or otherwise, of the share of the profits belonging to the testator's estate as at the death of his brother, Andrew, on March 4, 1938.]

Solicitors: *Thomas Eggar & Son, for Nye & Donne, Brighton; Janson, Cobb, Pearson & Co.*

K. R. A. H.

In re DE LA BERE'S MARRIAGE SETTLEMENT TRUSTS.

Considered. Re Dowie's Will Trusts. [1949] 1 Ch. 547

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May 28.

Settlement—Covenant to settle after acquired property—Exemption—Property excluded as to which intention expressed in instrument by which it was acquired—Settlement giving power of appointment to trustees—Exercise of power—Direction of trustees that property should be exempt from covenant—Direction effective and not in excess of power.

Where an instrument creates a power of appointment and a later instrument exercises that power, the interest created by the exercise of the power arises under the later instrument, for no such interest existed until the power was exercised so as to create it.

A marriage settlement, executed in 1919, on the marriage of R. B. and M. H., contained a covenant by the wife, M. H., to settle any after-acquired property, excepting (inter alia) any property regarding which an intention was expressed in the instrument under which the property was acquired that it should be exempt from the covenant. In 1938 a settlor made a settlement of property by which, after declaring certain trusts in favour of the wife, M. B., and her two sisters for a term of years, the trustees were empowered to appoint the funds to or for the benefit of M. B. and her issue and other beneficiaries in such shares and to such beneficiaries as they should in their absolute discretion determine. In 1941 the trustees of this settlement by deed poll appointed that on the expiry of the trusts declared by the settlement of 1938 the funds should go to M. B. and her sisters in equal shares, and declared their intention that each share should be exempt from the covenant to settle after-acquired property contained in the marriage settlements of each of them:—

Held, that the "instrument under which the property was "acquired" was the appointment by deed poll of 1941, that the direction to exempt the property was within the powers given to the trustees, and, therefore, that the fund appointed was the absolute property of M. B. and her two sisters.

In re Dickinson's Settlements [1939] Ch. 27 applied.

Summons.

The following statement of the facts is taken from the judgment. By a settlement dated April 29, 1919, and made on the marriage of Rupert de la Bere and Marguerite Humphery, daughter of Sir John Humphery, it was provided: "If the "wife shall at any time hereafter during the joint lives of "the husband and the wife or if the husband in her right "shall at any time or times during the said coverture become "by any means entitled to any property or any estate or interest "except property not exceeding 500*l.* in value vesting in possession during the said intended coverture at the same time "and from a single source and except any property as to which "in the instrument under which it is acquired by the wife or "in a writing signed by the donor of such property either "before or within six calendar months after making the gift "thereof an intention is expressed that it shall be exempt "from this present covenant or from any provision of a like "nature and except moveable chattels all of which hereinbefore "excepted property shall remain the wife's absolute property "and separate estate . . . . the said property (except as "aforesaid) shall at the expense of such property or the trust "fund be transferred by the wife her heirs executors or "administrators and all other necessary parties if any to the "trustee who shall either retain the same or any part thereof in "its then condition or shall sell call in and convert into money "such part of the said property as shall not consist of money "and invest the proceeds thereof and any money in manner "hereby authorized and the trustee shall hold the same and "the proceeds thereof and the investments for the time "being representing the same as part of and upon the same "trusts as the trust fund." On May 3, 1938, a settlement was made between one John Daniel Oppé, therein described as the settlor, and certain trustees, by which the settlor declared that the trustees were to hold the trust fund therein described upon trust for accumulation. Clause 4 provided: "Subject "to the trusts aforesaid, the trustees shall hold the trust fund "and the income thereof upon trust to pay or apply the "income therefrom to or for the benefit of such one or more "of the following—namely: Marguerite de la Bere, Joan "Burnett and Betty Nicory, the daughters of Sir John "Humphery and their issue respectively and in such proportions "or amounts as the trustees may from time to time think "fit for a period expiring twenty-one years from the date "hereof and on the expiration of such period upon trust to "divide the trust fund or any part thereof in such shares between "or to pay and transfer the same or any part thereof to such "one or more of the said Marguerite de la Bere, Joan Burnett, "and Betty Nicory or their issue respectively as the trustees "shall in their absolute discretion determine . . . . and so far "as the same shall not extend upon trust for the said Marguerite "de la Bere, Joan Burnett, and Betty Nicory, as tenants in "common in equal shares." On February 7, 1941, in exercise of the power of appointment given to them by the settlement, the trustees thereof executed a deed poll by which they " do "irrevocably appoint, direct, and determine that the trust "fund held by us as such trustees or any future trustee or "trustees of said settlement shall upon the expiry of the term "of the trusts of the said settlement go to and be the property "of Marguerite de la Bere, Joan Burnett, and Betty Nicory, "mentioned in said settlement, in equal shares, and we "hereby express the intention that the said share of each "of them in the trust fund shall be exempt from the covenant "to settle after-acquired property contained in the settlement "made prior to or after her marriage." Similar settlements to that of Marguerite de la Bere had been executed in the case of the other two daughters.

This summons was taken out by Marguerite de la Bere to determine whether or not the property appointed to her by the deed poll of February 7, 1941, was covered by the covenant to settle after-acquired property contained in her marriage settlement.

Hunt for the plaintiff. The instrument by which the interest of the plaintiff was acquired was not the settlement of 1938, but the appointment of 1941, and that appointment provided for the exemption of the property dealt with therein from the covenant in the marriage settlement to settle after-acquired property. The appointment conferred an entirely new interest which did not exist before: see Wolstenholme and Cherry's Conveyancing Acts, p. 1318, and *In re Dickinson's Settlements* (1), where the question was whether, for the purpose of s. 31

(1) [1939] Ch. 27.

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of the Trustee Act, 1925, property was acquired before or after the commencement of the Act, a settlement creating a power of appointment having been made before the Act came into force, but the power of appointment being exercised after that date. Crossman J. held that the property was acquired after the commencement of the Act, and that, therefore, s. 31 applied. In *In re Rush* (1), the question was whether property was subject to the charge created by the Peace Treaty, and it was held that the power of appointment having been exercised after the date of the Peace Treaty, it did not affect the property.

Hubert Rose for the defendants. The instrument under which the property was acquired by the plaintiff is the settlement of 1938 creating the power, since the appointment, when made, must be read back into the settlement: see *In re D'Angibau* (2). The intention takes legal effect, not from the exercise of the power, but from the gift of the person who delegated the power: *Pouey v. Hordern* (3). The exercise of the power was not a disposition of any property belonging to the trustees. Moreover, the creator of the power did not delegate to the trustees the necessary authority on his behalf, and the exercise by the trustees of their powers so as to exclude all the property appointed from the after-acquired property clause was in excess of their authority. If the trust, in default of appointment, had come into operation, the plaintiff's interest would have been covered by the covenant, as the settlor had expressed no intention to exempt it, and the trustees had no right to do so. *In re Dickinson's Settlements* (4) is a departure from earlier cases, and in any case it is only a decision on s. 31 of theTrustee Act, 1925.

Hunt in reply. The decision in *Pouey v. Hordern* (3) was simply on the distinction between property and power. The trustees of the 1938 settlement were given the widest powers of appointment and they could exercise them in whole or in part: see *Hodgson* v. *Halford* (5). Such powers of appointment ought not to receive a limited or narrow construction.

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(1) [1922] 1 Ch. 302.
(2) (1880) 15 Ch. D. 228, 243.
(3) [1900] 1 Ch. 492.
(4) [1939] Ch. 27.
(5) (1879) 11 Ch. D. 959.

SIMONDS J. [after stating the facts as set out above:] Two questions arise for determination. The first is whether the exclusion of the plaintiff's share of the trust fund from the operation of the after-acquired property clause in her marriage settlement was contained in the settlement creating the power or in the instrument under which the power was exercised. It is urged on behalf of the trustees of the marriage settlement that the deed poll of appointment was not the instrument under which the property was acquired by the wife, but that it was acquired under the settlement creating the power, wherein there was no intention expressed that the after-acquired property clause should be excluded. I think that it is reasonably clear that the instrument under which the plaintiff acquired her share of the trust fund was the deed poll of appointment under which the power was exercised.

In coming to that conclusion I am following the close analogy of the decision of Crossman J. in *In re Dickinson's Settlement* (1), where the judge had to consider the effect of s. 31 of the Trustee Act, 1925. That section confers on trustees power to pay or apply income for maintenance and other purposes where property is held by trustees for any person for any interest whatsoever whether vested or contingent, but sub-s. 5 of the section provides that the section does not apply where the document, if any, under which the interest arises came into operation before the commencement of the Act. A document creating a power had come into existence before the commencement of the Act, but the document exercising the power had come into existence after the commencement of the Act, and the question was whether the interest with which the trustees were purporting to deal arose by an instrument which came into operation before or after the commencement of the Act. Crossman J. held that the interest arose under the instrument by which the power was exercised, that is to say, an instrument which came into operation after the

(1) [1939] Ch. 27.

commencement of the Act, so that the sub-section did not exclude it from the exercise by the trustees of the power which they sought to exercise. In coming to that conclusion, Crossman J. found support in the earlier cases of *In re Rush* (1) and *Duke of Northumberland v. Inland Revenue Commissioners* (2). In fact, those cases are examples of a principle which seems to be perfectly clear, namely, that, where there is an instrument creating a power and a later instrument exercising that power, the interest created by the exercise of the power arises under the later instrument, for, in fact, there never was such an interest until the power was exercised so as to create it.

Accordingly, I come to the conclusion on the first point that the instrument under which the plaintiff acquired her interest was the instrument which contained the expression that it should be exempt from the covenant for the settlement of her after-acquired property.

It is then said that, nevertheless, the trustees were not authorized by the terms of the instrument creating the power to express on any exercise of it the intention that an interest taken by the plaintiff should be exempt from her covenant to settle after-acquired property. It is true that the settlement creating the power contains no such express provision, but if I look at the substance of it I find a power, unqualified and unlimited in its language, which is intended to give to the trustees exercising it the power to make the trust fund the property of any one or more of the daughters or their issue. It has been held that, where there is a power of that kind, it is competent for the donee to exercise it in such a way as to qualify the interest which may be given so that a power to appoint the whole of the fund must include the power to appoint a part of it. The power to appoint an absolute interest must include the power to appoint a limited interest, whether a life interest or a reversionary interest, and includes the power to hedge about the creation of an absolute interest with such restrictions as the donor of the power himself might have imposed. It is, I think, a corollary of that that the donee of such a power as this has also the right to make the exercise

(1) [1922] 1 Ch. 302.

(2) [1911] 2 K. B. 343.

of the power entrusted to him effective, and to do it, where it is necessary, by the expression of such an intention as will carry out in its entirety the effective exercise of the power which has been confided to him.

It is, in my judgment, essential so to construe a power of this kind as to enable the donee of it to exercise it effectively. That can only be done, where it is necessary for him to do it, if the donee of the power is competent to give such an expression of his intention as to exclude the operation of a covenant for the settlement of after-acquired property in a settlement made by an object of the power. Accordingly, I cannot regard the expression by the trustees contained in the instrument by which they exercised their power as being in excess of the power given to them. The result is that the trust fund is appointed to the three daughters of Sir John Humphery and the share of the trust fund is in each case excluded from the operation of the covenant.

Solicitors: *Druces & Attlee.*

H. L. L.

FARWELL J.

1941

May 28, 29, 30; June 17.

JOHN FOWLER AND COMPANY (LEEDS), LIMITED v. DUNCAN.

Emergency legislation—Control of undertaking—Powers of controller—Delegation of powers—Power to require company to increase bank overdraft—Emergency Powers (Defence) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 62), *s.* 1, *sub-s.* 2 (*b*)*—Defence (General) Regulations,* 1939, *reg.* 55, *para.* 4.

By an order dated March 21, 1941, the Minister of Supply, in exercise of his powers under reg. 55, para. 4, of the Defence (General) Regulations, 1939, appointed a controller of the plaintiff company. The order gave the controller control over the servants of the company, " all . . . . financial transactions in connection " with the said undertaking," contracts, obtaining of material and output, plant and machinery, and " the management and " conduct of the said undertaking." Disputes arose between the company and the controller concerning the conduct of the business, and the company brought an action against the Minister and the controller, claiming (1.) that the appointment of the controller, and the powers conferred on him were ultra vires the Minister, and (2.) that the controller, in the exercise of those powers, was attempting to exceed, and had exceeded, his authority :—

Held, (1.) that reg. 55, para. 4, of the Defence (General) Regulations, 1939, conferred on the Minister power to appoint a controller with the widest possible powers over the whole of the company, and not merely to control its policy with regard to contracts or similar matters, and, therefore, the appointment of the controller of the plaintiff company was intra vires the Minister and valid ; but (2.) that the controller had exceeded his power to control the financial transactions of the company by requiring the company to increase an overdraft on its banking account, the bank being prepared to lend the company further money, not on its own security, but because the Government would guarantee the bank in respect of sums so advanced, for which the company would remain the principal debtor.

Held, further, that a controller appointed under reg. 55, para. 4, cannot delegate to another person the powers of control conferred on him, but he may appoint another person to help him to carry out his duties.

MOTION.

The plaintiff company was incorporated in 1886 to take over an existing partnership business. The business of the company at first was the making of various forms of agricultural machinery, but not long before the war the company undertook the manufacture of certain engines which were saleable in times of both peace and war, and after the outbreak of war in September, 1939, it manufactured certain machines the use of which was mainly, if not wholly, connected with the war. To conduct those two different forms of manufacture which the company now carried on, to the exclusion of its original business, it had two accounts with its bank, one account being used in connection with the manufacture of the engines and the other in connection with that of the machines. The company, which had encountered financial and other difficulties, had obtained from its bank a substantial overdraft which was secured by a debenture over the whole of its property, assets and undertaking. The amount of that overdraft was the full extent to which the bank were prepared to assist the company. The company had contracts for both its products with different Government Departments. In the case of the second form of manufacture the contracts were all with the Minister of Supply. In the case of the manufacture of the engines, the contracts were with more than one Department.

By an order dated March 21, 1941, the Minister of Supply (the first defendant), in exercise of his powers under reg. 55, para. 4, of the Defence (General) Regulations (1) appointed

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(1) By Emergency Powers (Defence) Act, 1939, s. 1, sub-s. 1: "Subject to the provisions of this "section, His Majesty may by "Order in Council make such "regulations (in this Act referred "to as 'Defence Regulations') as "appear to him to be necessary or "expedient for securing the public "safety, the defence of the realm, "the maintenance of public order "and the efficient prosecution of "any war in which His Majesty "may be engaged, and for maintaining supplies and services "essential to the life of the "community."

Sub-s. 2: "Without prejudice "to the generality of the powers "conferred by the preceding sub-"section, Defence regulations "may, so far as appears to His "Majesty in Council to be neces-"sary or expedient for any of the "purposes mentioned in that sub-"section . . . . (*b*) authorise— "(i.) the taking of possession or "control, on behalf of His Majesty, "of any property or undertaking."

Sub-s. 3: "Defence regulations "may provide for empowering "such authorities, persons or "classes of persons as may be "specified in the regulations to "make orders, rules and byelaws "for any of the purposes for which "such regulations are authorised "by this Act to be made, and may "contain such incidental and "supplementary provisions as "appear to His Majesty in Council "to be necessary or expedient for

Charles Henry Crabtree (the second defendant) controller of the company and directed him to exercise the functions set out in the order. Those functions were stated thus: " (*a*) "Control over the appointment removal and terms of service "or employment of all officers servants and agents of the "said John Fowler & Co. (Leeds), Ld. engaged in or in connection with the said undertaking; (*b*) control over all "receipts expenditure and other financial transactions in "connection with the said undertaking and over all books "accounts and records kept or to be kept and all accounting and "preparation of accounts in connection with the said undertaking; (*c*) control over the entering into determination "modification performance and enforcement of contracts in "connection with the said undertaking; (*d*) control over "the obtaining of all materials for and the output of the "said undertaking; (*e*) control over the maintenance extension

"the purposes of the regulations."

Defence (General) Regulations, reg. 55, para. 4: " If it appears "to a competent authority that in "the interests of the public safety, "the defence of the realm, or the "efficient prosecution of the war, "or for maintaining supplies and "services essential to the life of "the community, it is necessary "to take control on behalf of His "Majesty of the whole or any part "of an existing undertaking, and "that, for the purpose of exercising such control, it is expedient "that the undertaking or part "should be carried on in pursuance "of an order made under this "paragraph, the competent "authority may by order authorise any person (hereinafter referred to as an 'authorised "'controller') to exercise with "respect to the undertaking or "any part thereof specified in the "order, such functions of control "on behalf of His Majesty as may "be provided by the order; and "so long as an order made under "this paragraph is in force with "respect to any undertaking or "part of an undertaking (*a*) the "authorised controller shall exercise his functions in accordance "with any instructions given to "him by the competent authority, "so, however, that he shall not "have power to give any directions "inconsistent with the provisions "of any Act or other instrument "determining the functions of the "undertakers except in so far as "may be specifically provided by "the order; and (*b*) the undertaking or part shall be carried on "in accordance with any directions "given by the authorised controller in accordance with the "provisions of the order, and any "person having any functions of "management in relation to the "undertaking or part shall comply "with any such directions."

Para. 5 provides that, among other persons who have the power to appoint a controller, is the Minister of Supply.

"and disposal of all buildings plant and machinery used in "connection with the said undertaking; and (*f*) control over "the management and conduct of the said undertaking."

The appointment of the controller resulted in friction between the board of the company and the controller. According to the evidence adduced by the company, so great had been the friction that the proper working of the business had been very largely stopped or, at any rate, considerably hampered. The company, therefore, had begun the present action and moved this motion to have decided two questions: (1.) whether the order of 1941 was ultra vires the Minister of Supply and consequently void, and, alternatively, the company asked for a declaration "that none of the functions "specified in paras. (*a*) to (*f*) of art. 1 of the said order is a "function of control within the meaning of para. 4 of reg. 55, "of the Defence (General) Regulations, 1939"; (2.) assuming that the order was intra vires the Minister, and, therefore, properly made, the company asked for a declaration that the controller had so exercised, or attempted to exercise, the powers given him by the order as to go outside that which he was authorized to do.

The motion, which it was agreed should be treated as the trial of the action, was argued in camera and so the contentions of counsel cannot be set out.

Harman K.C., *G. O. Slade* and *Michael Bowles* for the plaintiffs.

Sir Donald Somervell K.C., A.-G., and *Danckwerts* for the defendants.

Cur. adv. vult.

FARWELL J. [after stating the facts set out above:] The first question is what is the meaning of "control" or "controller" as used in reg. 55, para. 4, of the Defence (General) Regulations. In my judgment, it does not really assist me to consider what the position of a controller under other enactments may have been, or what construction the courts have put on the word in other connections and in other enactments. I have to consider what the words in this regulation mean. Nor does it seem to me to assist very much, if at all, to consider the powers of a receiver and manager and, as it were, measure up the possible powers of the controller as against the powers of a receiver and manager. Reg. 55, para. 4, does not state specifically what the powers of a controller are to be beyond the fact that he is to exercise functions of control, words which I do not think carry the matter very much further than the power to appoint a controller. In my judgment, the word "controller," as used in reg. 55, para. 4, has a very wide meaning and it enables the Minister of Supply to appoint a person to be controller with the widest possible powers over the whole and every part of the undertaking. It is not, in my view, limited, as was suggested on behalf of the company, to the control of the policy of the company in relation to contracts or matters of that kind. I do not think, therefore, that it is possible to come to the conclusion that the order made on March 31, 1941, in any way exceeds the very wide powers which were given to the Minister by reg. 55, para. 4. I think that all the matters which are defined in the order as matters over which the controller is to exercise his functions of control come within the power of the Minister. Therefore, the plaintiffs have failed to establish that they are entitled to the first part of the relief sought by them, and, so far as the action is against the Minister of Supply, it must fail.

I have still to consider whether the controller has by the methods that he has used trangressed the limits of the order. There has undoubtedly been very serious friction between the board and the controller. Whose fault that is it is not for me to determine. So far as regards the powers of control which are given to the controller by this order, with one exception I do not think it has been proved that he has exceeded those powers. In the first place, complaint has been made that the controller has delegated, or has attempted to delegate, his powers. If the controller had done or threatened to do that he would clearly have done something which was outside his power. Apart altogether from the actual terms of the order of March 21, 1941, a controller appointed by the Minister is the only person who can exercise the powers of a controller and he has no authority to appoint anyone to exercise those powers on his behalf or to attempt to delegate them to anyone. The Attorney-General did not suggest that any such power existed. But I do not think, although it may be that certain letters may have suggested that something approaching delegation was intended, that there was delegation in fact in the present case. What the controller has done has been to appoint someone to assist him in carrying out his duties and, so long as the appointment is confined to that and does not extend to authorizing another person to exercise any of the controller's powers, I can see no objection to it.

The other two matters which I wish to mention both deal with finance. There has been a considerable complaint made, and I have sympathy with it, that, among the steps which the controller has taken, he has directed the board to stabilize the banking account which was operated in connection with the manufacture of engines and to use only the other account which was used in connection with the machines. That, as it appears to the company, is a very high-handed action. The directors are anxious to carry on the first of the two forms of manufacture without any cessation because they hope that after the war there may be considerable business arising out of it, whereas the other form of manufacture may cease, or very largely cease, at the end of the war. Moreover, as they say, they have government contracts for the engines and they are anxious to carry them out. Whether the direction given by the controller be really a serious hardship on the company or not I do not know, but it seems to me that it comes within the words of cl. (*b*) of the order " Control over . . . . financial transactions in "connection with the said undertaking." However strong may be the company's grounds for the objection, I am not able to come to the conclusion that it was outside the powers of the controller to take the step which he has taken with regard to these two accounts and, therefore, so far as that is concerned, I cannot assist the company.

Finally, a matter on which I think the controller has gone outside his powers arises in this way. The controller thinks it necessary that the company should have control of a larger sum of money to enable it to carry out its contracts and he has accordingly directed the company to increase its overdraft at the bank to provide the necessary money. The company is unwilling to do that, because, by so doing it runs an added risk of the bank taking steps to appoint a receiver, or otherwise enforcing its security. The amount of money lent to the company in the past was up to the full limit which the bank was prepared to lend, but the bank is now willing to make further advances, not because of any extra resources of the company or anything which the company itself can do, but because the Government is prepared to guarantee the bank in respect of the money so advanced. No doubt, that may remove the difficulty which the bank would otherwise feel with regard to the company, but it in no way assists the company which remains the principal debtor for the money so borrowed. But, apart from that, the question whether the Government will assist the bank in making advances or will find money in some other way for the purposes of the company is wholly for the Government and not for the controller. It is a matter which is outside the controller's power, and it seems to me that for him to give a direction to the company to increase its overdraft when the company can do nothing of the kind except a third party is prepared to guarantee the money, is a long way outside the words of the order: "Control over . . . . financial transactions in connection "with the said undertaking." It is not, in fact, controlling the financial transactions of the company. It is ordering the company to do something which out of its own resources it is wholly unable to do, but which may be rendered possible by reason of the action of an outside party whom the controller in no way controls. In my judgment, it is not within the power of the controller to direct the company to undertake a new liability, which the company could not undertake so far as its own resources are concerned, and in attempting to give such a direction as that the controller has gone beyond the power which is given to him under this order.

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In the result, I am prepared to make an order that on the true construction of the order of March 21, 1941, and in the events which have happened the controller is not entitled to direct the company to increase its overdraft with the bank, and if it is desired the plaintiff company will be entitled to an injunction to the same effect.

Solicitors: *Maxwell, Batley & Co., for Simpson, Curtis & Burrill, Leeds; Treasury Solicitor.*

H. L. L.

MORTON J.

1941

June 24.

In re CHALFONT AND DISTRICT PERMANENT BUILDING SOCIETY'S APPLICATION.

Emergency legislation—Mortgage—House—Sole substantial asset—Payment of mortgage debt possible by sale of house—Loss of home—Ability of borrower " to pay the . . . . debt "—Default in payment of instalments—Circumstances . . . . attributable to . . . . war—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 4.

By sect. 1, sub-s. 4, of the Courts (Emergency Powers) Act 1939 : " If, on any application for such leave as is required under " this section for the exercise of any of the rights and remedies " mentioned in sub-sections (1.), (2.) and (3.) of this section, the " appropriate court is of opinion that the person liable to satisfy " the judgment or order, or to pay the rent or other debt, or to " perform the obligation, in question is unable immediately to " do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the " court may refuse leave for the exercise of that right or remedy, " or give leave therefor subject to such restrictions and conditions " as the court thinks proper."

The mortgagor of a house which is his home and his only substantial asset and which he can sell for slightly more than is owing on the mortgage is unable " to pay the . . . . debt " within the meaning of the sub-sections because, if he sold the house, he would lose his home which the Act intended to preserve.

A mortgagor who satisfies the court that he would have kept up the instalments payable under the mortgage deed but for " circumstances directly or indirectly attributable to . . . . war " brings his case within the sub-section.

ADJOURNED SUMMONS.

In 1938 the respondent bought a house for 1550*l.* from the applicants, the Chalfont and District Permanent Building Society, which lent him 1240*l.* of the purchase money. By a legal charge dated April 5, 1938, enabling the society to exercise its statutory remedies should the respondent default, the respondent covenanted to repay principal and interest by monthly instalments of 9*l.* 13*s.* 3*d.* By August 31, 1939, he had paid all the instalments which had fallen due except one. On September 3 war broke out between Great Britain and Germany. In October the society consented to accept from the respondent instalments of 6*l.* 10*s.* a month which covered the interest and left a small margin towards the repayment of the principal, but the respondent was unable to pay these instalments and in March, 1941, he owed 112*l.* In April the society issued this summons by which they applied under s. 1, sub-s. 2 (*a*), (ii.), (iv.), of the Courts (Emergency Powers) Act, 1939, for leave to exercise any remedy available to them as mortgagees by way of the appointment of a receiver of the property or the realization of their security.

The evidence showed that the respondent's professional practice as a solicitor was less remunerative than it had been before the war; that he had other assets, consisting of office and private furniture, which he valued at 150*l.*, that, his age being 51, he had a reversionary life interest, subject to the life interest of his stepmother, then aged about 76, in half of the residuary estate of his father which he understood to have been valued for probate at 17,000*l.*, but that he had not tried to raise money on that interest; and that he could probably have sold the house, in which he and his family lived, for rather more than what remained owing on the mortgage, which, at the date of the hearing, was just over 1200*l.*

Goff for the society. The society is entitled to exercise its remedy by appointing a receiver or realizing the security. If the respondent wishes to bring his case within s. 1, sub-s. 4, the burden is on him to prove that he is "unable immediately "to pay the . . . . debt" and that his inability is due to circumstances "directly or indirectly attributable" to the war, and that he has failed to do. Conceding that the debt on the mortgage is just over 1200*l.*, the respondent could discharge it by selling the house. He has not really tried to do so, but he has set too high a price on it. Secondly, he has taken no proper steps to ascertain the value of his reversionary life interest in his father's residuary estate and to raise money on that interest.

Bradley Dyne for the respondent. This is pre-eminently a case in which the court should exercise its discretion in favour of the respondent. So far from the respondent having been indifferent or careless, he has done his utmost to act to the best advantage of the society and to place all the evidence possible before the court. His failure to equip himself fully with evidence about the reversionary life interest is attributable to failure to appreciate the position and not to intent deliberately to deceive.

Clearly he cannot pay the debt out of the earnings from his practice which fact is entirely attributable to the war inasmuch as before the war those earnings were substantially larger than they are now and at the beginning of the war he had defaulted on one instalment only. Previously he had always paid regularly, and he intended to continue so to do. It is true that, while the respondent has not been able to obtain the 2500*l.* which he sought, for the house, he might well obtain 1250*l.* for it and so discharge the mortgage debt. But one of the objects of the Act is to enable a person in the position of the respondent to keep his home. If the respondent sells his house to satisfy the debt, he will lose his home, and that the court will not allow.

MORTON J. [having stated the facts:] Mr. Goff for the society has argued that the respondent has not discharged the burden which rests on him of proving that he is unable immediately to pay the debt or perform the obligation in question, that being the first of two matters on which the court must be satisfied by the respondent if the case is to be brought within s. 1, sub-s. 4, of the Courts (Emergency Powers) Act, 1939. Mr. Goff accepts the position that the debt, within the meaning of the sub-section, is, in the present case, the total sum of just over 1200*l.* which has become due from the respondent under the provisions of the mortgage, and I propose to decide the case on the footing that that is the correct view of the sub-section, although it might possibly have been argued that other views were open to the court.

I have to decide whether the respondent has satisfied me that he is unable to pay the 1200*l.* First, it is plain that he cannot pay it out of his earnings from his practice. Manifestly, from them alone he would be unable at the moment even to keep up the instalments. The two assets on which Mr. Goff relies as showing that the respondent has not discharged the onus which lies on him of proving that he is unable to pay the debt are, first, the house itself, and, secondly, the reversionary life interest under the will of the respondent's father.

With regard to the house, Mr. Goff points out that the respondent has made no real effort to sell it. He suggests that the respondent has possibly put too high a price on it, and that that is why he has not yet had any offers of purchase.

In my view, however, the object, or one of the objects, of this legislation is to enable a borrower, in the circumstances which are stated in the Act, to preserve his home. I do not think that it could be said that, if a man owes 1200*l.* on mortgage of a house which could be sold for (say) 1250*l.*, he is able to pay the debt within the meaning of the Act. I do not think that that can have been the intention of the legislature. It is true that he can sell the house for 1250*l.* and pay off the whole of the mortgage debt, but in the very act of doing it he has lost that which the Act intended to preserve, namely, his home. In the present case the position might be different to some extent if it were possible for the respondent to raise money on a second mortgage on the house. As to that, I need not express a concluded opinion, because the respondent has tried to raise money from the bank on second mortgage and the bank will advance nothing. [Dealing with the reversionary life interest, his Lordship expressed the view on the facts that the respondent could not raise anything approaching 1200*l.* by a sale or mortgage thereof, and continued :] Viewing the matter as a whole, I am satisfied that the respondent is unable immediately to pay the debt of 1200*l.*

That, however, is not the end of the matter. I have now to consider whether the respondent's inability to perform his obligations under the mortgage is due to circumstances directly or indirectly attributable to the war. That also is a matter on which it is for the respondent to satisfy the court. The evidence appears to me to have established that, had there been no war, the respondent would have continued to pay the instalments as they fell due or within a few days thereafter.

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Had he kept up the instalments, the principal sum of 1200*l.* would not have become immediately due and payable, and I think that a debtor brings his case within the sub-section if the court comes to the conclusion that he would have kept up the instalments but for circumstances directly or indirectly attributable to the war.

That being my view of the matter, I clearly have a discretion under sub-s. 4. The question then arises whether I should exercise it in favour of the respondent and, if so, on what terms. His counsel asks me to make an order which will give him relief so long as he pays 6*l.* 10*s.* on the first Tuesday in every month or within a reasonable period thereafter. I think that that is a reasonable suggestion. I shall stand the summons over generally with liberty to the society to restore it in chambers if the respondent fails to pay 6*l.* 10*s.* within fourteen days from to-day, or fails to pay 6*l.* 10*s.* on the first Tuesday in July, and in each subsequent month, or within fourteen days after the due date of each such payment. The society's costs of this application, up to and including to-day, will be added to their security.

Solicitors: *Haslewood, Hare & Co., for Francis & How, Chesham; C. V. Young & Son.*

K. R. A. H.

In re ROBB'S CONTRACT.

C. A.

SIMONDS J.

1941

Apr. 23, 24, 25; *May* 7.

C. A.

July 22, 23, 29, 31.

Vendor and purchaser—Stamps—Conveyance on trust for sale included in title—Conveyance expressed to be intended to be followed by instrument declaring trusts of proceeds of sale—Adjudication—Finance (1909–10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 74, *sub-ss.* 2, 6.

Where a title to property includes a conveyance on trust for sale expressed to be intended to be followed by the execution of a trust instrument declaring the trusts of the proceeds of sale, the purchaser is entitled to require that the conveyance be adjudicated for stamp duty under s. 74, sub-s. 2, of the Finance (1909-10) Act, 1910.

So *held* by the Court of Appeal (Lord Greene M.R., Clauson and du Parcq L.JJ.) affirming the decision of Simonds J.

VENDOR AND PURCHASER SUMMONS.

On December 20, 1940, the vendors, John Robb, Donald Finlaison Sutherland and William Henry Taylor, agreed to sell and the purchaser, the Amalgamated Engineering Union, agreed to purchase certain freehold property, the title to which included a conveyance on trust for sale dated March 31, 1932. By this conveyance, which was made between George Henry Drummond, as settlor, of the one part, and John Robb, George Hunter and Donald Finlaison Sutherland, as trustees, of the other part, the settlor granted to the trustees the property in question on trust that they should sell the same and hold the net proceeds and the net rents and profits of so much thereof as should, for the time being, remain unsold "upon the trusts and with and subject to the powers and "provisions declared and contained concerning the same "respectively by and in a deed of settlement already prepared "and expressed to be made between the same parties in the "same order as this deed and intended to bear even date with "and to be executed immediately after this deed." The conveyance contained a trustee charging clause in the usual form and a power to mortgage the property to raise necessary sums. The conveyance, which formed part of the vendors' title, was stamped with a 10*s.* stamp. The trustees were now: John Robb, Donald Finlaison Sutherland and William Henry Taylor. By a requisition the purchaser claimed that the conveyance ought to be adjudicated and stamped accordingly. The vendors replied that the 10*s.* stamp was sufficient, By this summons, taken out under ss. 49 and 203 of the Law of Property Act, 1925, the purchaser asked for a declaration that the requisition had not been sufficiently answered.

Daynes K.C. and *Bonner* for the purchaser. The requisition has not been sufficiently answered. Adjudication is indispensable if the conveyance is to be deemed to be duly stamped: see s. 74, sub-ss. 1, 2, 5 and 6, of the Finance (1909-10) Act, 1910 (1). The conveyance operates "as a voluntary disposition

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(1) Sect. 74, sub-s. 1: "Any "conveyance or transfer operat"ing as a voluntary disposition "inter vivos shall be chargeable "with the like stamp duty as if "it were a conveyance or transfer "on sale, with the substitution in "each case of the value of the "property conveyed or trans"ferred for the amount or value "of the consideration for the sale ". . . ."

Sub-s. 2: "Notwithstanding any"thing in s. twelve of the principal "Act" [the Stamp Act, 1891], "the Commissioners may be re"quired to express their opinion "under that section on any "conveyance or transfer operat"ing as a voluntary disposition "inter vivos, and no such con"veyance or transfer shall be "deemed to be duly stamped "unless the Commissioners have "expressed their opinion thereon "in accordance with that section." [The questions on which the commissioners are, by s. 12 of the Act of 1891, required to express their opinion are whether the instrument is chargeable with duty, and, if so, the amount of the duty chargeable.]

Sub-s. 5: "Any conveyance or "transfer (not being a disposition "made in favour of a purchaser or "incumbrancer or other person in "good faith and for valuable "consideration) shall, for the pur"poses of this section, be deemed "to be a conveyance or transfer "operating as a voluntary dis"position inter vivos, and (except "where marriage is the considera"tion) the consideration for any "conveyance or transfer shall not "for this purpose be deemed to "be valuable consideration where "the Commissioners are of opinion "that by reason of the inadequacy "of the sum paid as consideration "or other circumstances the con"veyance or transfer confers a "substantial benefit on the person "to whom the property is con"veyed or transferred."

Sub-s. 6: "A conveyance or "transfer made for nominal con"sideration, for the purpose of "securing the repayment of an "advance or loan, or made for "effectuating the appointment of "a new trustee or the retirement "of a trustee, whether the trust "is expressed or implied, or "under which no beneficial "interest passes in the property "conveyed or transferred, or made "to a beneficiary by a trustee or "other person in a fiduciary "capacity under any trust, whet"her expressed or implied, or a "disentailing assurance not limit"ing any new estate other than "an estate in fee simple to the "person disentailing the property, "shall not be charged with duty "under this section, and this sub-

"inter vivos" for the purposes of sub-s. 2, which requires "adjudication: for the effect of sub-s. 5 is that any conveyance not being a disposition for value is, for the purposes of sub-s. 2, a voluntary disposition inter vivos: *Baker* v. *Inland Revenue Commissioners* (1), per Viscount Cave L.C. The vendors' answers, aimed at allaying the purchaser's apprehensions, say that the settlement of even date is believed to have been correctly stamped, but they do not say that it has been adjudicated. Adjudication is a safeguard for the revenue. In Key and Elphinstone's Precedents in Conveyancing, 10th ed., vol. ii., p. 565, and 14th ed., vol. ii., p. 561, the view is taken that the conveyance in trust for sale requires an ad valorem stamp and the settlement of the proceeds of sale a deed stamp only: see also Prideaux Precedents in Conveyancing, 21st ed., vol. ii., p. 1043, and 23rd ed., vol. iii., p. 923, note (*f*), and Encyclopædia of Forms and Precedents, 2nd ed., vol. xvi., p. 219. That would seem to be right, because the conveyance on trust for sale is the link in the chain of title, but some conveyances may have followed the analogy of the modern strict settlement. Since 1925 the strict settlement has been made by a vesting deed which bears a deed stamp only and a trust instrument which bears the ad valorem duty: see Settled Land Act, 1925, s. 4, sub-s. 3 (*e*), which provides that the trust instrument shall bear any stamp duty payable, whether by virtue of the vesting deed or otherwise, in respect of the settlement. That is the effect of statute law, and it does not apply to the present case. Although, in *Martin* v. *Inland Revenue Commissioners* (2), Rowlatt J. thought that the ad valorem duty should be charged on the settlement, he took the opposite view in *Ansell* v. *Inland Revenue Commissioners* (3). It makes a practical difference whether what is valued is the land or the proceeds of sale, the amount of which would be uncertain

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"section shall have effect notwithstanding that the circumstances exempting the conveyance or transfer from charge under this section are not set forth in the conveyance or transfer."

(1) [1924] A. C. 270, 274.

(2) (1930) 15 Annotated Tax Cases, 631; Serjeant on Stamp Duties, Appendix, p. 320.

(3) [1929] 1 K. B. 608.

and would be diminished by the costs of sale: cf. *In re Stucley's Settlement* (1). So long as a voluntary conveyance of land attracted a deed stamp only, no difficulty arose with regard to keeping trusts off the title by means of a conveyance in trust for sale or, as it used to be called, a trader's settlement. In the case, however, of a transfer of property on the appointment of a new trustee, two points arose, namely, first, whether the deed stamp gave the purchaser constructive notice of a trust, and, secondly, whether a purchaser could accept a deed stamp as sufficient notice without adjudication. Both these points arose in *In re Soden and Alexander's Contract* (2) where the first point was decided in favour of the vendors but the second was got over only by an offer to have the stamp adjudicated. If the property to be transferred is a mortgage, the first point is met by s. 112 of the Law of Property Act, 1925, which replaces s. 13 of the Conveyancing Act, 1911, and provides that where, on transfer of a mortgage, stamp duty, if payable according to the amount of the debt transferred, would exceed ten shillings, a purchaser shall not, by reason of its bearing only a ten shilling stamp, whether adjudicated or not, be deemed to have had notice of any trust, and of the transfer's having been made to effectuate the discharge of a trustee or appointment of a new trustee. The second point, however, remains a difficulty in the case of a mortgage for more than 2000*l.*, and adjudication would seem to be the only way out: see Williams on Vendor and Purchaser, 4th ed., p. 298, note (*f*). Since 1910 the second point applies to a conveyance of land in trust for sale if it bears a deed stamp duty. The practice set out in the official circular contained in Serjeant on Stamp Duties at pp. 51 and 52, indicates the official attitude with regard to penalties, but it would not affect an objection that a transfer was not sufficiently stamped without adjudication: see *Conybear* v. *British Briquettes, Ld.* (3). The conveyance is not within any exception contained in sub-s. 6. The exception of a conveyance under which no beneficial interest passes applies, not to a conveyance under which the grantee takes no beneficial interest, for example, a conveyance to trustees on trusts, but to a conveyance under which the grantor passes no beneficial interest, as, where an outstanding legal estate is conveyed by a bare trustee to an active trustee, or where a settlement is executed pursuant to directions in a will: see Prideaux Precedents in Conveyancing, 23rd ed., vol. iii., p. 100. In the present case the estate concerned was sold and conveyed under the conveyance. It certainly did not pass under the settlement of even date. If the true view is that it passed under both deeds, the exception will not apply. There is nothing here to justify the conclusion that at any point of time after the conveyance there was a resulting trust for the settlor. In *Martin* v. *Inland Revenue Commissioners* (1) the court knew the contents of both deeds, which had been adjudicated. That case is difficult to reconcile with *Brennan Minors' Trustees* v. *Scanlan* (2). The professional trustees charging clause is contained in the conveyance and confers a beneficial interest: *In re Pooley* (3). Even if the conveyance does fall within sub-s. 6 as being one under which no beneficial interest passes it is, although freed from ad valorem duty, not freed from the requirement of adjudication under sub-s. 2. It would have been easy to provide in sub-s. 6 that the documents specified in the exceptions should fall within sub-s. 2, but the legislature has not done so.

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(1) (1870) L. R. 5 Ex. 85.

(2) [1918] 2 Ch. 258, 262, 267.

(3) (1937) 81 Sol. J. 943.

Gray K.C. and *G. D. Johnston* for the vendors. The requisition has been sufficiently answered. No beneficial interest passes under the conveyance, and sub-s. 6 of s. 74 of the Act of 1910 exempts such a conveyance from need of adjudication. The sub-section enumerates five classes of instruments. They are all clearly exempted from the operation of the section and are not to be charged with duty, and it is absurd to contend that any one of them must be adjudicated under the section. Especially would this be absurd in the case of a conveyance or transfer to effectuate the appointment of a new trustee. With regard to whether any beneficial interest passes under the conveyance, it is true that the conveyance gives professional trustees power to charge, but the whole point of sub-s. 6 for the present purpose is contained in the words "under which no beneficial interest passes," and in all cases arising under the sub-section the substance of the transaction has to be looked at. In the present case, the beneficial interest is not in the land, but is in the proceeds of sale: see Law of Property Act, 1925, s. 28, sub-s. 2, and Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., vol. i., p. 271*n*; and the voluntary transfer of the beneficial interest in the proceeds of sale is clearly effected by the trust instrument, not by the conveyance. It cannot be contended that the true result is not as in *Martin* v. *Inland Revenue Commissioners* (1). The ad valorem duty ought to be charged on the settlement, even though the other view was taken in *Ansell* v. *Inland Revenue Commissioners* (2). Until the trust instrument is executed, there is a resulting trust in favour of the settlor. Once it has been executed, there is a complete trust in favour of the beneficiaries under the settlement. The conveyance, therefore, is not chargeable with duty, and the commissioners need not adjudicate on it. [They referred to *Brennan Minors' Trustees* v. *Scanlan* (3); the official circular set out in Serjeant on Stamp Duties at pp. 51 and 52; *Baker* v. *Inland Revenue Commissioners* (4); *In re Soden and Alexander's Contract* (5), per Younger J.] In any case, whether or not the conveyance falls within sub-s. 6, and whether or not, if it does, it also falls within sub-s. 2, it is the trust instrument, not the conveyance, which has to be stamped. The trust instrument is the document which completes the transfer and under which the beneficial interest passes, and that is the real test: see Serjeant on Stamp Duties, p. 220, and Halsbury's Laws of England, 2nd ed., vol. xxviii., p. 476; *Associated British Engineering, Ld.* v. *Inland Revenue Commissioners* (6). The note in Key and

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(1) 15 Annotated Tax Cases 631; Serjeant on Stamp Duties, Appendix, p. 320.

(2) [1925] W. N. 114; 9 Tax Cas. 427.

(3) (1888) 40 Ch. D. 1.

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(1) 15 Annotated Tax Cases 631; Serjeant on Stamp Duties, Appendix, p. 320.

(2) [1929] 1 K. B. 608.

(3) [1925] W. N. 114.

(4) [1924] A. C. 270, 274.

(5) [1918] 2 Ch. 258, 267.

(6) [1941] 1 K. B. 15.

Elphinstone, 10th ed., vol. ii., p. 565; 13th ed., vol. ii., p. 496; 14th ed., vol. ii., p. 561, which is nothing more than a note, does not bear the meaning for which the purchaser contends. It is a warning that, where there are two separate documents, a conveyance and a trust instrument, there is a "conveyance or transfer" and the duty imposed by s. 74 is payable. The note is entirely non-committal. Nor do the precedents in Key and Elphinstone show anything conclusive. The note in Prideaux, 21st ed., vol. ii., p. 1043; 23rd ed., vol. iii., p. 923, note (*b*), is also inconclusive. [They referred also to Encyclopædia of Forms and Precedents, 2nd ed., vol. xvi., p. 219.] The attention of the court has been directed to powers under the Settled Land Act, 1925, with regard to a vesting deed. Conveyances on trust for sale have been common since 1840, but until the Finance (1909–10) Act, 1910, they were always stamped 10*s*. without question. The Settled Land Act, 1925, provided by Sch. II., para. 1 (8.), that no ad valorem duty should be payable in respect of a vesting deed. That was due to a desire to assimilate the practice with regard to vesting deeds to the practice with regard to conveyances on trust for sale. The deed will bear the 10*s*. fixed deed stamp only: see Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., vol. ii., p. 1208*n*. Thus, what had been the practice up to 1910 is still the practice since 1925.

Daynes K.C. and *Bonner* in reply.

Cur. adv. vult.

SIMONDS J. This application raises a question between vendor and purchaser which is of some importance to conveyancers, namely, whether a purchaser is entitled to require the adjudication for stamp duty of a conveyance on trust for sale which is intended to be followed by the execution of a trust instrument in which will be declared the trusts of the proceeds of sale of the property so conveyed. [His Lordship stated the effect of the deed of March 31, 1932.]

This is the short, but not easy, question which I have to

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decide. It is surprising that it has not been decided before now.

[His Lordship read s. 74, sub-ss. 1, 2, 4, 5 and 6, of the Finance (1909–10) Act, 1910, and s. 12 of the Stamp Act, 1891 (1), and continued:] Two questions were argued—(*a*) whether the conveyance of March 31, 1932, is an instrument under which no beneficial interest passes in the property conveyed or transferred so as to fall within sub-s. 6, and (*b*) whether, assuming it does so fall, it is, nevertheless, subject to the operation of sub-s. 2 and must be submitted for adjudication.

In my judgment, the first question must be answered in the affirmative. It was said that a beneficial interest in the property conveyed passed under the instrument (*a*) because it appeared on the face of the instrument that the trustees were to hold the proceeds of sale of the property and the rents and profits of so much thereof as should remain unsold on trust for the benefit of persons who could be ascertained by reference to a document already prepared and intended to be executed, and (*b*) because the instrument contained a charging clause with power to raise any necessary sums by mortgage of the property. As to the first ground, it appears to me that, unless and until the second deed is in fact executed, no beneficial interest can pass, but that there is a resulting trust in favour of the settlor who remains master of the situation. He may change his mind if he will, and can up to the last moment refuse to execute the trust instrument. This was the view taken in *Martin* v. *Inland Revenue Commissioners* (2), and I think that it is clearly right. I am not excluding the possibility of a binding trust being created in favour of third parties on the execution of the conveyance on trust for sale where there already exists an obligation on the settlor to settle the property in a particular way. That was the decision in *Brennan Minor's Trustees* v. *Scanlan* (3), but I have no such circumstances here.

The second ground is also, I think, unsound. The test is whether a beneficial interest in the property conveyed passes under the instrument itself, and I do not think that an administration provision, by virtue of which in certain events the trustees may have recourse to the property for their charges, satisfies this test.

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(1) The sections are set out, ante pp. 464, 465.

(2) 15 Annotated Tax Cases, 631; Serjeant on Stamp Duties, Appendix, p. 320.

(3) [1925] W. N. 114; 9 Tax Cas. 427.

Being thus of opinion that this is an instrument which falls within sub-s. 6, I have next to determine whether it is covered by sub-s. 2 and must be adjudicated. In my judgment, this question also must be answered in the affirmative. The instrument is, beyond doubt, a conveyance operating as a voluntary disposition inter vivos within sub-s. 1. The language of sub-s. 2 is comprehensive: "No such conveyance "or transfer shall be deemed to be duly stamped unless the "commissioners have expressed their opinion thereon in "accordance with that section," that is, their opinion whether any and what duty is chargeable. It was argued that sub-s. 6, which provides that certain instruments shall not be charged with duty under the section, should be interpreted as meaning that those instruments are outside the section altogether and are neither chargeable with duty nor subject to the adjudication of the commissioners. This argument cannot, in my view, prevail. In the first place, if this is what was intended, nothing would have been easier than for the legislature to have said so. The plain language of the section read as a whole, is against the contention. In the second place, although I hesitate to invoke what is sometimes called the policy of the Act when the language is sufficiently clear, I think that the contention of the vendor would tend to defeat the intention of the Act. The conveyancing device of conveyance on trust for sale with attendant instrument of trust, the latter instrument being kept off the title, was a familiar one long before 1910. It is common ground that under s. 74 ad valorem duty has to be paid either on the conveyance or on the trust instrument. If the vendor is able to stamp the conveyance with a 10*s.* deed stamp only, without adjudication, the purchaser, who cannot look at the trust instrument, has no means of knowing whether an ad valorem duty has been paid at all. Thus the revenue loses the valuable safeguard which is

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afforded by the purchaser's right and duty to make requisitions with regard to stamps.

It was urged that the legislature could not have intended that others of the classes of instruments included in sub-s. 6 should be adjudicated, and, therefore, that this cannot be its true meaning. Reference was made in particular to a conveyance or transfer made for effectuating the appointment of a new trustee. But I find that, so far from this being a reductio ad absurdum of the purchaser's contention, it is the view actually taken by the learned editors of Williams on Vendor and Purchaser, 4th ed., vol. i., p. 298, note (*f*), that such a deed does, or may, require adjudication. Moreover, the concluding words of the sub-section point in the same direction. It is appropriate that the commissioners should, for the purpose of adjudication, be able to investigate the circumstances alleged to afford exemption from ad valorem duty, whether or not they are set out in the conveyance or transfer.

It is unnecessary for me to determine whether the conveyance or the trust instrument should bear the ad valorem stamp. The precedent books do not seem to agree, and it is immaterial so long as the one bears the ad valorem duty, and the other is adjudicated.

Accordingly, I make a declaration that the requisition has not been sufficiently answered, and I order that the respondents pay the costs.

K. R. A. H.

The vendors appealed.

Gray K.C. and *G. D. Johnston* for the vendors.

Daynes K.C. and *Bonner* for the purchaser.

The arguments were substantially the same as in the court of first instance.

LORD GREENE M.R. This appeal raises a troublesome question on the true construction of s. 74 of the Finance (1909-10) Act, 1910. Shortly put, it is whether or not a conveyance of land on trust for sale, which forms part of the vendors' title, ought to bear an adjudication stamp. The purchaser objects that the document is not properly stamped unless it bears such a stamp. To get rid of one or two preliminary points, I wish to say that, in my opinion, that document is one under which, in the language of s. 74, sub-s. 6, of the Act, no beneficial interest passes in the property conveyed or transferred. I need add nothing to the judgment of Simonds J. on that point as I am in entire agreement with it.

Sect. 74, sub-s. 1, imposes ad valorem stamp duty on conveyances or transfers operating as voluntary dispositions inter vivos. The sub-section directs that any such conveyance or transfer is to be " chargeable with the like stamp duty as "if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed "or transferred for the amount or value of the consideration "for the sale." The expression " conveyance or transfer "operating as a voluntary disposition," is defined in sub-s. 5 which provides : " Any conveyance or transfer (not being a "disposition made in favour of a purchaser or incumbrancer "or other person in good faith and for valuable consideration) "shall, for the purposes of this section, be deemed to be a "conveyance or transfer operating as a voluntary disposition "inter vivos." Pausing there, the effect of that definition is to sweep within its net every conveyance or transfer which does not fall within the excluding words as being a " disposition "made in favour of a purchaser or incumbrancer . . . ." The effect of that is, down to this point, that the document in question is, for the purposes of the section, to be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos. The sub-section continues : " and (except where "marriage is the consideration) the consideration for any "conveyance or transfer shall not for this purpose be deemed "to be valuable consideration where the commissioners are "of opinion that by reason of the inadequacy of the sum "paid as consideration or other circumstance the conveyance "or transfer confers a substantial benefit on the person to "whom the property is conveyed or transferred." That contemplates the expression of an opinion by the commissioners to ensure that conveyances for inadequate consideration

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do not slip through the net. I may say in passing, with regard to a phrase to which some argument was addressed, namely, the phrase " shall not for this purpose be deemed," that, in my judgment, the words " this purpose " refer to the definition in the earlier part of the sub-section which I have read, so that that branch of the sub-section is, so to speak, a subsidiary definition clause, which defines " valuable "consideration " for the purpose of the first part of the sub-section.

Turning back, therefore, to s. 74, sub-s. 1, we find that this conveyance is to be chargeable " with the like stamp duty "as if it were a conveyance or transfer on sale." Sub-s. 2 provides that " the commissioners may be required to express "their opinion under that section on any conveyance or "transfer operating as a voluntary disposition inter vivos, "and no such conveyance or transfer shall be deemed to be "duly stamped unless the commissioners have expressed "their opinion thereon in accordance with that section." It seems to be clear that the words " no such conveyance or "transfer shall be deemed to be duly stamped," are to be construed as referring to the words " conveyance or transfer "operating as a voluntary disposition inter vivos," and cannot be confined to such documents of that description as have been submitted to the commissioners for adjudication. In other words, the sub-section requires every document which falls within the definition of a " conveyance or transfer "operating as a voluntary disposition inter vivos " to be taken in to the commissioners for adjudication in accordance with s. 12 of the Stamp Act, 1891. Sect. 12 of the Stamp Act, 1891, gives the commissioners power to express their opinion with reference to any executed instrument on two questions : (*a*) whether it is chargeable with any duty, and (*b*) with what amount of duty it is chargeable. The incorporation into s. 74, sub-s. 2, of that machinery makes it clear that one of the questions which the commissioners may have to decide is whether the document tendered for their opinion is chargeable with any duty at all. The sub-section, therefore, on the face of it, appears to me to contemplate quite clearly that among the documents which fall to be submitted to the commissioners under it, there will be documents which are not chargeable with any duty, and that the question whether or not they are chargeable, will be determined by the commissioners when they adjudicate under s. 12 of the Act of 1891.

Pausing there again, the language of sub-s. 2 of s. 74, combined with the other provisions which I have read, appears to me to prescribe without any room for doubt, that every conveyance or transfer which falls within the definition of "a voluntary disposition inter vivos" must bear an adjudication stamp, and, if it does not, it is not to be deemed to be duly stamped. Therefore, the document in question is not to be deemed to be duly stamped unless it bears an adjudication stamp. As a pure matter of construction I can see no escape from that conclusion so far as I have got in examining the section. The object of compelling the submission to the commissioners of every voluntary disposition is, from the revenue point of view, clear. The legislature obviously was anxious that the authorities should have the opportunity of scrutinizing every voluntary disposition or every document purporting to be a voluntary disposition, to see whether or not it was a voluntary disposition, whether the consideration was adequate, and whether or not, under some form of camouflage, the instrument was escaping the burden of the stamp law. I should say at this stage that the view that sub-s. 2 imposes a general obligation in respect of such documents to have an adjudication stamp impressed on them has been taken in two previous cases which I need not examine in detail, one a decision of Younger J. in *In re Soden and Alexander's Contract* (1) and the other a decision of Bennett J. in *Conybear* v. *British Briquettes, Ld.* (2).

I now come to the only real argument of substance which it is necessary to consider, and that is based on sub-s. 6. It was obviously realized by the legislature that there were certain classes of documents regarding which it would be unjust to exact ad valorem stamp duty, and, accordingly, in sub-s. 6 provision is made exempting documents of those classes from the charge. [His Lordship read the sub-section (1).] It is argued that the effect of that sub-section is to remove from the ambit of the charge all documents of the descriptions there set forth, and, further, to exempt such documents from the provisions of sub-s. 2 which require an adjudication stamp. That argument has this attractiveness about it, that, if it were correct, it would avoid very serious inconveniences in the conduct of business affairs. I have been impressed throughout the argument with the inconveniences which must flow from the decision which, in my opinion, is the right decision, but, although it is always right to give full weight to considerations of that kind, it is not permissible to be so affected by them as to place a forced construction on words which have a clear meaning in the ordinary use of language. In this case I find myself unable to construe the provision in question in such a way as to avoid those inconveniences without doing to the language of the section a violence which is not justified.

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(1) [1918] 2 Ch. 258.

(2) (1937) 81 Sol. J. 943.

The argument is that, as the object of the section is to impose a charge to stamp duty and as sub-s. 6 removes from the scope of the charge the documents there described, the effect is that sub-s. 1 must be read as though it had said: "Any conveyance or transfer operating as a voluntary "disposition inter vivos, other than those mentioned in sub-s. 6 "of this section, shall be chargeable with the like stamp duty "as if it were a conveyance or transfer on sale." That, I think, is the most compendious form of putting the first step in the argument. Then it is said that, as the documents enumerated in sub-s. 6 are taken out of the ambit of the charge, there can be no reason for construing the section in such a way as to leave them within the provisions of sub-s. 2. If, it is said, these documents are exempted from duty, what point can there be in compelling them to be brought in to the commissioners for adjudication? And emphasis, as I have said, is rightly laid on the great inconvenience which would be caused by taking the view that they should be so brought in. In effect, the argument really amounts to the submission that sub-s. 6 should be construed as though it had provided that s. 74 is not to apply to the documents specified in the sub-section. Had it enacted that in terms, there could of course, have been no doubt about the matter, because the effect would have been that, not merely would those documents have been taken out of the charge imposed by sub-s. 1, but they would also unquestionably have been taken out of the provisions of sub-s. 2. The difficulty is that sub-s. 6 does not say so, and when the legislature wished to exclude a particular form of document from the whole of the provisions of the section it did so in the clearest possible language in the proviso to sub-s. 1 which enacts that the section is not to apply to a conveyance or transfer operating as a voluntary disposition of property to a specified class of incorporated body. That would have been the way in which to limit the application of the whole section so as to exclude from all its provisions a particular class or particular classes of documents. All that is done by the language of sub-s. 6 is to exclude the documents there specified from chargeability to duty. The section, however, not only enacts, in sub-s. 1, the chargeability to duty. It also, by sub-s. 2, as I have already pointed out, requires every document which falls within the definition of a "voluntary disposition inter vivos" to be brought for the adjudication of the commissioners to see whether or not it is chargeable with duty. I cannot regard that provision as a mere piece of machinery which ceases necessarily to be applicable when once a particular document is excluded from chargeability under sub-s. 1. It seems to me that there is an independent reason, which I have already mentioned, for the existence of that machinery, and that there is nothing unreasonable in the legislature directing that, while certain classes of documents shall not be subject to charge, nevertheless they are to be produced to the commissioners for them to see whether or not they are exempt from chargeability. Accordingly, I am unable to construe the words "shall not "be charged with duty under this section" in sub-s. 6, as though they amounted to an entire exclusion of the documents there mentioned from the whole operation of the section. It seems to me quite impossible to take that view on any proper principle of construction.

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(1) The sub-section is set out ante pp. 464, 465.

That really disposes of the matter, but I cannot leave this case without saying one further word on the matter of inconvenience. The inconvenience of the conclusion to which I have come from the point of view of business with bankers and so forth when transfers for nominal consideration to secure an advance are made, is obvious. Indeed, the inconvenience has impressed itself on the Commissioners of Inland Revenue, who have issued a circular which endeavours to deal with that inconvenience. The circular, in so far as the directions therein contained are inconsistent with the decision to which this court has come on the question now before it, has no support in law, however much, as a matter of practical administration of the Act, the commissioners may desire to waive its strict provisions. The court cannot allow the existence of that circular to affect its mind in deciding what is the true construction of the section. All that the circular does is to emphasize in a very striking way the great inconvenience of the section when it is construed as I consider it should be construed, and the matter may well be one for the attention of the legislature. All we can do is to construe the Act.

In the result, I find myself in entire agreement with the conclusion of Simonds J. and the appeal must be dismissed with costs.

CLAUSON L.J. With much reluctance I find myself compelled, by the inexorable logic of the Master of the Rolls, to concur in the judgment which he has just delivered. I will not conceal the fact that I have made the most strenuous efforts to see whether, consistently with the canons of construction by which this court is bound, a different result could not be achieved because I am conscious of the great inconvenience which this decision probably will cause. If it were a question of two competing constructions of ambiguous words, one would, no doubt, be justifiably swayed in deciding in favour of one construction or the other by a consideration of the results which would follow and of what the legislature was likely to have meant, but where the words, as I am afraid they do in this case, can only lead to one result, such considerations as I have mentioned must be put aside.

I cannot think that when the legislature adopted this unfortunately phrased sub-s. 6, they can have realized what a serious burden was being placed on the public. As the Master of the Rolls has pointed out, that this burden is serious is shown by the fact that the Commissioners of Inland Revenue issued, many years ago, a circular, an extract from which will be found in Mr. Serjeant's book on Stamp Duties at p. 51. In it, assuming, as I do, that our construction of the section is correct, the commissioners deliberately invite persons whose duty it is to act only on properly stamped documents to disregard the provisions of the section. I mention that as showing how great the inconvenience must be found to have been. I cannot think that the commissioners issued a circular knowing it to invite persons to take an illegal course, and for a long time I tried to persuade myself that it was possible so to construe the section as to treat that circular as inviting persons concerned to take a course which would be legal. Unfortunately, neither the commissioners nor His Majesty's Treasury, are represented here. It may be that, if they had been represented, it would have been possible to resolve the difficulty and come to a conclusion which would have reconciled the true construction of the section with the circular.

I wish to make an observation about one point which I confess did not occur to me in the course of the argument. A good deal was made of the inconvenience arising from the section if it involves an adjudication of every transfer made for nominal consideration to secure the repayment of an advance or loan. I think that I do see a possible loophole there. It will be observed that a conveyance or transfer which is not a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration is to be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos, and it occurs to me that possibly—it is not necessary to decide it and I do not propose to say anything which can be treated as a decision—a transfer made for nominal consideration in favour of a person who has advanced money may come within the words of exception as being a disposition made in favour of an incumbrancer in good faith and for valuable consideration, and may, therefore, not fall within the definition of "a "conveyance or transfer operating as a voluntary disposition "inter vivos." That might justify the Commissioners of Inland Revenue in not insisting on the adjudication of a transfer of shares, executed in such circumstances, but I find in the circular that persons who have to register transfers are invited not to require adjudication of, among other things, transfers vesting property in trustees on the appointment of a new trustee of a pre-existing trust or on the retirement of a trustee, and I cannot see anything in the section which would fail to bring such documents within the words " a . . . . transfer . . . . made for effectuating "the appointment of a new trustee or the retirement of a "trustee," and, accordingly, I can observe no possible legal justification for the commissioners inviting responsible officers to act on such documents although they are not adjudicated.

I doubt whether, in passing sub-s. 6, the legislature appreciated the burden which was being laid on the public, a burden the magnitude of which is shown by the fact that it was thought necessary to issue the circular to which I have referred. I have hesitated long before accepting a construction of the section which must involve the conclusion that the Commissioners of Inland Revenue have either misconstrued the section or thought it within their duty to authorize persons to disregard its operation. Although I have used every endeavour to see if I could suggest any answer to the inexorable logic to which I have already referred, I have failed to find it, and, therefore, I agree that the section must be construed as the Master of the Rolls has stated, and the appeal be dismissed.

DU PARCQ L.J. I also agree with the judgment of the Master of the Rolls for the reasons he has given, and there is nothing I can usefully add.

Appeal dismissed.

Solicitors for plaintiff: *Evill & Coleman.*
Solicitors for defendants: *Fladgate & Co.*

H. C. C.

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July 3, 22.

In re STAPLETON-BRETHERTON.

WELD-BLUNDELL *v.* STAPLETON-BRETHERTON.

Covenant—Deed of covenant—Mutual covenants to pay annuities—No trust in favour of beneficiaries—Death of one covenantor—Payment by survivor to beneficiaries, not to estate of deceased covenantor.

In October, 1918, two brothers executed a deed of covenant under which each of them covenanted that he would make provision for named beneficiaries by the payment to them of certain annual sums. One of the brothers died in 1938:—

Held, (1.) that no trust was created by the deed in favour of the beneficiaries; (2.) that the executors of the will of the deceased brother were not entitled to require the survivor to make the payments to them, but that the survivor was entitled to perform his obligation in the way in which he had agreed to perform it and to pay the stipulated sums to the beneficiaries.

Cleaver v. *Mutual Reserve Fund Life Association* [1892] 1 Q. B. 147, distinguished.

ADJOURNED SUMMONS.

By a deed of covenant made on October 14, 1918, between Frederick Bartholomew Stapleton-Bretherton, of the one part, and his brother, Edmund Joseph Stapleton-Bretherton, of the other part, it was recited (1.) that, under a will dated February 7, 1882, the father of the parties to the deed, was tenant for life of certain settled property, and Frederick Bartholomew Stapleton-Bretherton was first tenant for life in remainder, with further remainders under which Edmund Joseph Stapleton-Bretherton might become tenant for life; (2.) that, in the event of Frederick surviving his father and succeeding to the property devised by the will of February 7, 1882, his wife, Bertha Mary Stapleton-Bretherton, would on his death become entitled to a jointure rentcharge not exceeding 700*l.* a year and each of his daughters would become entitled to a capital sum of 1000*l.* The deed proceeded as follows: "In consideration of the covenants hereinafter entered into "on the part of the said Edmund Joseph Stapleton-Bretherton "the said Frederick Bartholomew Stapleton-Bretherton hereby "covenants with the said Edmund Joseph Stapleton-Bretherton "that if the said Frederick Bartholomew Stapleton-Bretherton "shall survive his father and succeed to the [settled property] as "tenant for life [under the will of February 7, 1882] he will during "his life pay to the said Edmund Joseph Stapleton-Bretherton "and after his death to his widow the annual sum of 1000*l.* [in "manner therein mentioned] in each year and . . . . in "consideration of the covenant on the part of the said Frederick "Bartholomew Stapleton-Bretherton hereinbefore contained "the said Edmund Joseph Stapleton-Bretherton hereby "covenants with the said Frederick Bartholomew Stapleton-"Bretherton as follows namely that in the event of the said "Frederick Bartholomew Stapleton-Bretherton surviving his "father and dying without male issue or in the event of the "said Frederick Bartholomew Stapleton-Bretherton dying in "the lifetime of his said father he the said Edmund Joseph "Stapleton-Bretherton will if he shall succeed to the said "[settled property] as tenant for life [under the will of "February 7, 1882] during his life pay to the said Bertha Mary "Stapleton-Bretherton such an annual sum of money as will "with the other income received by her under and by virtue "of the [will of February 7, 1882] and of the said settlement "made upon her marriage or either of them make up her "income to the sum of 1000*l.* a year [in manner therein "mentioned] and also that he the said Edmund Joseph "Stapleton-Bretherton will in the same circumstances as "are in this clause hereinbefore mentioned during his life and "if he shall succeed as aforesaid pay to each of the two "daughters of the said Frederick Bartholomew Stapleton-"Bretherton namely Ruth Mary Elizabeth Bodley and Hetty "Stapleton-Bretherton such an annual sum of money as will "with the income derived from the capital moneys which they "may have received under the will [of February 7, 1882] and [a "marriage settlement] or either of them and in the case of the "said Ruth Mary Elizabeth Bodley under her marriage "settlement make up the income of each such daughter to the "sum of 300*l.* per annum such annual sum being paid" in manner therein mentioned.

The father of the parties to the deed died on April 13, 1919,

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and Frederick Bartholomew succeeded to the settled estates. He died on October 13, 1938, leaving his widow, Bertha, and his two daughters him surviving but no sons, and Edmund Joseph succeeded to the settled estates as tenant for life in possession. Frederick, in pursuance of his covenant, paid Edmund 1000*l.* from April 13, 1919, until his death.

A summons was taken out by the executors of Frederick for the determination of the questions (1.) whether the sums paid or thereafter to be paid by Edmund pursuant to his covenants with Frederick contained in the deed of October 14, 1918, were impressed with trusts in favour of the widow, Bertha, and her two daughters, or whether the same formed part of the estate of Frederick ; and (2.) by whom the covenants entered into by Edmund could be enforced and what was their effect.

Evidence was given by Edmund on affidavit that the object of his covenant was to benefit his sister-in-law and her children to whom he was attached, and that, when the deed of covenant was entered into and at the present time, he considered it to be a moral duty not to allow them to be in want, and that he was ready, in pursuance of that duty, to undertake what he believed and intended to be a legal obligation for their benefit, but not to undertake any obligation which would benefit the estate of his late brother.

Wilfrid Hunt for the applicants. The executors of Frederick are the only persons who are entitled to enforce the covenant and are able to give a valid receipt for these sums which are payable into Frederick's estate : see *Cleaver* v. *Mutual Reserve Fund Life Association* (1) ; *In re Englebach's Estate* (2) ; *In re Sinclair's Life Policy* (3).

Spens K.C. and *Droop* for the widow and two daughters of Frederick and for another respondent. These sums are payable direct to the beneficiaries. The covenantor is entitled to fulfil his covenant according to its terms. It is clear that there

(1) [1892] 1 Q. B. 147.

(2) [1924] 2 Ch. 348.

(3) [1938] Ch. 799.

was no intention on the part of the covenantor that this money should form part of Frederick's estate.

Waite for Edmund Joseph Stapleton-Bretherton.

Cur. adv. vult.

July 22. SIMONDS J. [after stating the facts:] It seems clear beyond all doubt that no trust in favour of the widow and daughters of Frederick is created by the deed of covenant. They are not parties to the deed, and there is not to be found in it one word which suggests that either Frederick or Edmund was a trustee for any third party of the benefit of any covenant or of any sum of money that might be paid thereunder. The case is covered by such authorities as *Cleaver* v. *Mutual Reserve Fund Life Association* (1); *In re Englebach's Estate* (2); and *In re Sinclair's Life Policy* (3).

The more difficult question is that raised by the claim put forward by Edmund that he is entitled to fulfil his covenant according to its terms by paying the stipulated sums to the widow and daughters of Frederick. On the other hand, Frederick's executors claim that the consideration for the covenant came from Frederick, that they alone are entitled to enforce the covenant, and that they can require its fulfilment by payment to them. In effect they say that, since they alone can sue, they alone can give a valid receipt, and that they will give it only if the money is paid as they require. They rely on the following passage in the judgment of Lord Esher in *Cleaver* v. *Mutual Reserve Fund Life Association* (1): "I should "say that, on the true construction of the policy, the only persons "who could claim under it, and give a valid receipt for the "money insured, were the executors of the insured." I do not, however, think that this claim by the executors is well founded. Where, as in *Cleaver* v. *Mutual Reserve Fund Life Association* (1) and the other insurance policy cases which I have cited, the proper inference from the document itself and from such circumstances as may properly be taken into consideration,

(1) [1892] 1 Q. B. 147, 153.
(2) [1924] 2 Ch. 348.
(3) [1938] Ch. 799.

is that the destination of the covenanted sums is a matter of indifference to the covenantor, so that the designated payee may be regarded as the nominee of the covenantee, and, as a matter of construction, the covenant can be read as if the words "or as the covenantee may direct" were inserted after the name of the payee, it may well be that the covenantee or his executors can unilaterally vary the terms of the obligation and require a mode of payment different from that expressly prescribed. Where, on the other hand, the proper inference is that the destination of the payment is, to the covenantor, an essential part of the bargain, it cannot be varied except by the consent of both contracting parties. Here I should have no doubt, apart altogether from Edmund's statement to that effect, that it was a matter of concern to him, as it was to Frederick, that in certain events provision should be made for Frederick's widow and daughters, and that part at least of Edmund's object in making the arrangement would be defeated if the sums which he had agreed to pay went to Frederick's creditors or legatees, leaving him, possibly, to make further provision, as a matter of affection or family obligation for the widow and daughters. In the circumstances Edmund is, in my judgment, entitled to perform his obligation in the way in which he agreed to perform it, and to decline to perform it in any other way.

I, therefore, answer the question raised by the amended summons by saying that the executors of Frederick Bartholomew Stapleton-Bretherton are not entitled to direct Edmund to pay the covenanted sums to them instead of to the persons named in the deed.

Solicitors: *Taylor, Kirkman & Mainprice; Taylor and Humbert.*

J. L. D.

In re A DEBTOR [No. 1 of 1941].

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May 12;
June 30;
July 28.

Bankruptcy — Lunatic — Adjudication — Concurrence of court in lunacy—Act of bankruptcy before appointment of receiver by court in lunacy—Trustee subject to direction of court in lunacy—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 18, *sub-s.* 1; *s.* 149.

A person of unsound mind (whether found lunatic by inquisition or not) can be adjudicated a bankrupt under s. 18, sub-s. 1, of the Bankruptcy Act, 1914, without the concurrence of the court in lunacy, where the act of bankruptcy has been committed before the debtor came under the jurisdiction of the court in lunacy.

On January 21, 1941, a bankruptcy notice was served on a debtor requiring him to pay a judgment debt, and on the following day his mother applied to the court in lunacy for the appointment of a receiver. The debtor failed to discharge the debt by January 28, and thereby he committed an act of bankruptcy, and on January 30 a bankruptcy petition was presented. In February the master in lunacy made an interim order appointing a receiver of the debtor's property with authority to take possession thereof and on March 4 he made a final order in the same terms. On March 17 a receiving order was made against the debtor in the county court:—

Held, (1.) that the debtor could be adjudicated bankrupt without the concurrence of the court in lunacy; but (2.) that the direction and control assumed by the court in lunacy could not be ousted by the trustee in bankruptcy, although, if the debtor recovered his faculties, the trustee could then administer the property for the benefit of the creditors; and (3.) that the registrar was right in making the receiving order.

Appeal from receiving order made by the registrar of the Barrow-in-Furness and Ulverston County Court.

On January 8, 1941, the petitioning creditors recovered judgment against the debtor for 1114*l*. 4*s*. 9*d*. and 11*l*. 18*s*. 6*d*. costs. On January 21 a bankruptcy notice was served on the debtor requiring him to pay the total sum of 1126*l*. 3*s*. 3*d*. This sum was not paid, and, accordingly, the debtor committed an act of bankruptcy on January 28, seven days after service of the bankruptcy notice. On January 22, 1941, the debtor's mother applied to the court in lunacy for the appointment of a receiver. On January 30 a bankruptcy petition was presented. On February 18 an order was made by the master in lunacy appointing the Official Solicitor to be receiver ad interim until the hearing, on March 4, of the application by the debtor's mother. The receiver was ordered to take possession of the furniture, goods, chattels and effects and all other real and personal property belonging to the debtor and to take such steps as might be necessary for the protection thereof. On March 4 an order was made by the master in lunacy, which, after reciting that one of the visitors in lunacy had reported that the debtor was, by reason of mental disability, incapable of managing his affairs, provided: "1. The Official Solicitor is appointed receiver in this matter, "but with such powers only as may be conferred upon him "by this or any subsequent order or direction under the seal "of the master. 2. The receiver is to take possession of the "furniture, goods, chattels and effects and all other real and "personal property belonging to the patient and to take such "steps as may be necessary for the protection thereof. "3. As from the date hereof so much as may be necessary "not exceeding the net income of the patient is allowed for "his maintenance. 4. The receiver is authorized in the name "and on behalf of the patient to receive and give a discharge "for: (*a*) The rents and profits, including all arrears thereof, "of the freehold property to which the patient is entitled, "with power to manage and let the same for any period or "periods not exceeding three years and to pay all proper "outgoings in respect thereof; (*b*) the rents and profits, "including all arrears thereof, of the freehold property of "which the patient is tenant for life within the meaning of the "Settled Land Act, 1925, with power to manage and let the "same for any period or periods not exceeding three years "and to pay all proper outgoings in respect thereof; (*c*) all "directors' or other fees, dividends, interest, and income, and "all arrears thereof respectively, to which the patient is or "may become entitled, and also to receive all notices affecting "the patient or his property. 5. The receiver is authorized "and directed: (*c*) To investigate and report to the master "as to (i.) what arrangements should, in the best interests of "the patient, be made for his future treatment, care and

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"maintenance; (ii.) particulars of the real and personal "estate, property and effects of the patient and his financial "interest therein and the desirability of discharging any "encumbrances on any of the real property; (iii.) the debts "of the patient, and whether the same or any of them are "secured, and, if so, how, and as to what arrangements should "be made for the payment of the same (including the applicant's "taxed costs of this application); (iv.) whether any property "of the patient has been disposed of by him without proper "consideration, and, if so, to whom, and whether any such "property is in the custody, or under the control, of any, and, "if so, what, persons, and what steps should be taken for the "recovery thereof." On March 17 a receiving order was made by the registrar of the Barrow-in-Furness and Ulverston County Court and the Official Solicitor, who had been appointed under r. 297 of the Bankruptcy Rules, 1915, to appear and act for and in the name of the debtor, now asked that it should be discharged and the bankruptcy petition dismissed.

Aronson for the appellant. A person of unsound mind not so found by inquisition cannot be adjudicated a bankrupt. If he can, it must only be under the direction of the court in lunacy. The Bankruptcy Act, 1914, s. 15, sub-s. 10, and s. 149, and the Bankruptcy Rules, 1915, r. 199, sub-r. 1, and r. 297, sub-r. 1, only apply to a case where a debtor becomes a lunatic after the date of the receiving order or where a lunatic's committee or quasi-committee has presented a bankruptcy petition with the leave of the court in lunacy. He referred to *Crispe* v. *Perrit* (1); *Ex parte Layton* (2); *Anonymous* (3); *Ex parte Stamp* (4); *Ex parte Cahen* (5); *In re Lee* (6); *In re James* (7); *In re Farnham* (8); *In re Farnham* (*No.* 2) (9). Even if this debtor can be adjudicated bankrupt, there is sufficient cause why a receiving order

(1) (1744) Willes 467, 473.
(2) (1801) 6 Ves. 434.
(3) (1807) 13 Ves. 590.
(4) (1846) De G. 345.
(5) (1879) 10 Ch. D. 183.
(6) (1883) 23 Ch. D. 216.
(7) (1884) 12 Q. B. D. 332.
(8) [1895] 2 Ch. 799.
(9) [1896] 1 Ch. 836.

should not have been made. Where one officer of the court has already been appointed to take possession of the property, it is not proper to appoint another who must either oust the first or have nothing to receive. The result of the orders made by the court in lunacy appointing the Official Solicitor receiver of all the debtor's property, is that there is no property which can become assets in the bankruptcy, while, if the debtor were adjudicated bankrupt the title of the trustee in bankruptcy would relate back to January 28, 1941, the date of the act of bankruptcy, and the order of the court in lunacy would become nugatory because there would be no property of the lunatic to which it could apply. If that were the law no receiver appointed by the court in lunacy could safely deal with any assets until he was satisfied that the patient had not, before the order of the court, committed an act of bankruptcy, which might subsequently form the foundation of an adjudication. He referred to the Lunacy Act, 1890, ss. 108 and 116, and to *In re Betts* (1); *In re Walker* (2); *In re Belton* (3); *In re Marshall. Marshall* v. *Whateley* (4).

Beyfus K.C. and *G. Kingham* for the respondents. A person of unsound mind, whether so found by inquisition or not, can be made bankrupt under the Bankruptcy Act, 1914. It appears from s. 106 of the Bankruptcy Act, 1861, that the legislature then considered that such a person might be made bankrupt, and lunatics are not exempted from the provisions of the Bankruptcy Act, 1914. They referred to *Anonymous* (5); *Ex parte Cahen* (6); *In re Lee* (7); *In re Farnham* (8), and to the Lunacy Act, 1890, s. 116. There is no sufficient cause why a receiving order should not have been made so as to give the trustee in bankruptcy a legal title forthwith and possibly enable him to get in assets which may be beyond the reach of the receiver appointed by the master in lunacy, for example, settlements which might be void as against the trustee in bankruptcy or payments which the debtor might

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(1) [1897] 1 Q. B. 50.
(2) [1905] 1 Ch. 161.
(3) (1913) 108 L. T. 344.
(4) [1920] 1 Ch. 284.
(5) 13 Ves. 590.
(6) 10 Ch. D. 183.
(7) 23 Ch. D. 216.
(8) [1895] 2 Ch. 799.

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have made and which could be set aside as constituting a fraudulent preference under bankruptcy law.

Aronson in reply.

Cur. adv. vult.

1941. July 28. MORTON J. read the judgment of the court (FARWELL and MORTON JJ.) in which he stated the facts and continued: It is manifest that before any order was made by the court in lunacy the debtor had committed an act of bankruptcy. If the receiving order is allowed to stand, and if the debtor is subsequently adjudicated bankrupt, his bankruptcy will be deemed to have relation back to, and to begin at, a date before that on which any order was made by the court in lunacy: see s. 37 of the Bankruptcy Act, 1914.

Counsel for the appellant contends, first, that a person in the position of the debtor, that is to say, a person of unsound mind not so found by inquisition, cannot be adjudicated a bankrupt, or, alternatively, cannot be adjudicated a bankrupt otherwise than under the direction of the court in lunacy. Secondly, he contends that, even if his first contention is wrong, a receiving order ought not to have been made in the present case, having regard to the orders already made by the court in lunacy. We entertain no doubt that a person of unsound mind (whether so found by inquisition or not) can be adjudicated a bankrupt under the direction of the court in lunacy. This is, in our view, well settled by authority, and was treated as being so settled in *In re Farnham* (1) to which we must refer later. In the present case, however, the receiving order was made in the face of opposition by the debtor's quasi-committee, and it becomes necessary for us to consider whether such a person can be adjudicated bankrupt without the concurrence of the court in lunacy. In considering this question we see no grounds on which a distinction can be drawn between a lunatic so found by inquisition and a person of unsound mind not so found. It is to be observed that the provisions of the Lunacy Act, 1890, relating to management and administration

(1) [1895] 2 Ch. 799.

apply equally to a lunatic so found by inquisition and to a person in the position of the debtor in the present case.

The question which we now have to decide was expressly left open by the Court of Appeal in *In re Farnham* (1). That was a case of a lunatic so found by inquisition, and Lindley L.J. said (2): "Now, the legal questions which arise are these; "First of all, there is the broad question—and it is an important "one—whether a person who has been found lunatic by "inquisition can be adjudicated a bankrupt at all. That "question is by no means so free from difficulty as at first "sight appears. There is no doubt whatever that the first "section of the Bankruptcy Act, 1890, applies in terms to all "debtors; and, as has been pointed out in argument, all "debtors include not only lunatics but infants; but there "may be a difficulty in holding that an infant could be "adjudicated a bankrupt under that section, and a difficulty "in holding that a lunatic can be so adjudicated. It appears "that this doubt about the validity of adjudications in bankruptcy against lunatics is a very old one, and has not yet "been altogether removed; and I do not propose on the "present occasion to solve that doubt. If it were necessary "to do so, I should like to look a little more closely than I "have done into the course that legislation has taken about "lunatics and into the authorities; but I shall assume for "the purpose of this decision that Mr. Farnham has been "validly adjudicated a bankrupt, and that his trustee has "been validly appointed." Later, Lindley L.J. said (3): "Although I believe it is perfectly well settled that a lunatic "can be adjudicated a bankrupt under the direction of the "committee acting under the order of the judge in lunacy, "there is a question whether he can be validly so adjudicated "apart from that," and in the course of the argument Lindley L.J. said (4): that the question had been an open one since the time of Lord Eldon. Lopes L.J. also left the question open, and Rigby L.J. said (5): "I am not myself satisfied "that there can be an adjudication in bankruptcy against a

(1) [1895] 2 Ch. 799.
(2) Ibid. 806.
(3) Ibid. 807.
(4) Ibid. 805.
(5) Ibid. 810.

"lunatic otherwise than through the judge in lunacy directing "the committee in the name of the lunatic to commit an act "of bankruptcy. Without that direction there are reasons "which show that it is difficult to see how an adjudication in "bankruptcy can operate as against a lunatic, however it is "brought about. How can a lunatic commit an act of "bankruptcy? That is one question that has to be answered. "Again, how can the jurisdiction of the court of bankruptcy "be set up, without the consent of the judge in lunacy, as "against the jurisdiction and the administration of the judge "in lunacy? By the prerogative of the Crown, which has "been exercised for centuries through the Lord Chancellor "with the addition in recent times of the Lords Justices, the "care of the lunatic and the disposition of his estate are "vested in the judges in lunacy; and during the centuries "in which that jurisdiction has been exercised certain rules "have been laid down, and among them a rule which appears "in the first instance harsh—that, notwithstanding the just "claims of creditors, the lunatic must be taken care of first, "that is, that he must have proper maintenance provided for "him before the creditors can take a single penny. That is "the law as it has been administered for a very long time "indeed. As to whether a lunatic can be adjudicated bankrupt, "otherwise than under the direction of the judge in lunacy, "I do not now determine that question. It is a very important "one. It has been in doubt, and it will remain in doubt until "it is expressly raised in a case which requires decision."

We have arrived at the conclusion that the debtor in the present case can be adjudicated a bankrupt without the concurrence of the court in lunacy. We can find nothing in the bankruptcy or lunacy legislation now in force, or in any decided case, which leads us to the conclusion that a person of unsound mind (whether found lunatic by inquisition or not) cannot be made a bankrupt without the concurrence of the court in lunacy. Nor can we discover any principle which should induce us to arrive at that conclusion. With regard to the query of Rigby L.J., "How can a lunatic commit an "act of bankruptcy?", we do not doubt that a person of unsound mind is incapable of committing an act of bankruptcy which involves intent on his part, but in the case which we are considering this question does not arise, since the act of bankruptcy, even if it can be treated as involving any intent on the part of the debtor, was committed before the debtor came under the jurisdiction of the court in lunacy.

We shall, first, consider the bankruptcy and lunacy legislation now in force, and shall then refer to certain cases cited in argument. It is conceded by all the counsel concerned in this case that there is no express provision in any statute now in force dealing with bankruptcy or with lunacy that a person of unsound mind cannot be adjudicated bankrupt. This fact is not of itself conclusive, but there are certain provisions in the Bankruptcy Act, 1914, and in the Bankruptcy Rules, 1915, which afford some indication that such a person can be adjudicated bankrupt. By s. 15, sub-s. 10, of the Bankruptcy Act, 1914: "Where the debtor is a lunatic or suffers from "any such mental or physical affliction or disability as in the "opinion of the court makes him unfit to attend his public "examination, the court may make an order dispensing with "such examination, or directing that the debtor be examined "on such terms, in such a manner, and at such place as to "the court seems expedient"; and s. 149 provides, so far as it is material: "For all or any of the purposes of this Act . . . . "a lunatic may act by his committee or curator bonis." By r. 199, sub-r. 1, of the Bankruptcy Rules, 1915: "An application "for an order dispensing with the public examination of a "debtor or directing that the debtor be examined in some "manner or at some place other than is usual, on the ground "that the debtor is a lunatic, or suffers from mental or physical "affliction or disability rendering him unfit to attend a public "examination, may be made by the Official Receiver or by "any person who has been appointed by any court having "jurisdiction so to do to manage the affairs of or represent "the debtor, or by any relative or friend of the debtor who "may appear to the court to be a proper person to make the "application." Under the heading of "Lunatics" r. 297, sub-r. 1, provides: "Where it appears to the court that any "debtor or creditor or other person who may be affected by "any proceeding under the Act or rules, is a lunatic not so "found by inquisition (hereinafter called the lunatic), the "court may appoint such person as it may think fit to appear "for, represent, or act for, and in the name of the lunatic, "either generally, or in and for the purpose of any particular "application or proceeding, or the exercise of any particular "rights or powers which under the Acts and rules the lunatic "might have exercised if he had been of sound mind. The "appointment may be made by the court either on an "application made as here-inafter mentioned, or, if the court "thinks fit to do so, without any previous application." Counsel for the appellant points out that these provisions may only be intended to apply to a case in which the debtor becomes a lunatic after the date of the receiving order, or to a case in which a lunatic's committee or quasi-committee had presented a bankruptcy petition with the leave of the court in lunacy. That is true, but there is nothing in the language of these provisions to suggest that they are so limited in their application. It is worthy of note that s. 106 of the Bankruptcy Act, 1861, provides as follows: "If any person being or "alleged to be of unsound mind shall be in prison for debt, "the gaoler shall forthwith require a justice of the peace for "the county or place wherein such prison shall be to visit "such debtor, and to inquire into his state of mind; and "such justice shall call to his assistance two duly qualified "medical practitioners, each of whom shall be a physician, "surgeon, or apothecary, and each of whom shall separately "examine such debtor; and if such two medical practitioners "shall each sign a certificate with respect to such debtor, "according to the form in Sch. H to this Act annexed, and "such justice shall be satisfied from his own view that such "debtor is of unsound mind, he shall certify the same to the "proper court, and thereupon the court may appoint some "person to represent such debtor, and direct such proceedings "to be taken for adjudication in bankruptcy against him as "the court shall think fit; and all proceedings under such "adjudication shall be had and carried on in the same manner "and with the like effect as if such prisoner had been of sound "mind, and had presented a petition to the court for "adjudication of bankruptcy, or as near thereto as the "difference of circumstances will permit." That section does not appear in the later bankruptcy legislation—no doubt owing to the abolition of imprisonment for debt—but its enactment in 1861 shows that the legislature saw no reason why a lunatic should not be made a bankrupt.

We now turn to the authorities which Mr. Aronson, for the appellant, has cited to us, and we are much indebted to Mr. Aronson for his research into the matter. The first is *Crispe* v. *Perrit* (1). Willes C.J. said in the course of his judgment: "An infant or a lunatic cannot be a bankrupt." No grounds are stated for his opinion, and the question whether a lunatic could be made a bankrupt was not before the court for decision. The next cases which were cited to us were *Ex parte Layton* (2) and *Anonymous* (3). The former case contains a dictum of Lord Eldon (4) which appears to indicate a view that a commission of bankruptcy would not be appropriate in the case of a lunatic. In the latter case, the report of which is very short and very difficult to follow, Lord Eldon is reported as saying (3): "A commission of "lunacy will not protect the lunatic against an action; and "a commission of bankruptcy is a species of action, against "which the lunacy cannot be a defence." This case would appear to be some authority for the proposition that a lunatic could be made a bankrupt in 1807. In *Ex parte Stamp* (5), the facts, as stated in the report, were as follows: "There "were two fiats, a joint fiat and a separate fiat, in the case, "and there were two petitions, one to annul the separate fiat "and in favour of the joint fiat; and the other a cross petition "to annul the joint fiat. On July 28, 1845, Sir George Rose "made an order dismissing both petitions. This was a petition "of rehearing. It appeared that one of the bankrupts was "non compos mentis, and that the act of bankruptcy relied

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(1) Willes 467, 473.
(2) 6 Ves. 434.
(3) 13 Ves. 590.
(4) 6 Ves. 439, 440.
(5) De G. 345.

"upon was the failure to pay or secure a debt according to "the Act, 5 & 6 Vict., c. 122, s. 13. Mr. Anderdon, in "support of the petition to annul the joint fiat, contended "that a lunatic could not be a bankrupt. Mr. Russell and "Mr. Bagshawe, for the assignees and the joint fiat, contended "that lunatics were liable to the bankrupt laws, not being "expressly excluded. Mr. Younge for the petitioning creditor. "A witness was examined viva voce in court as to the state "of mind of the bankrupt." The chief judge, Knight Bruce V.-C., said (1): "The evidence makes me doubt the validity "of the joint fiat. The legislature must have intended service "on a person who could give a bond or dispute a debt, which "a person fatuous or delirious cannot do. Can such a person "commit an act of bankruptcy by omitting to give a bond? "I think the validity of the joint fiat open to most serious "doubts, and that it would be an act of the greatest imprudence "to annul the separate fiat. I am of opinion that Sir George "Rose's order both as to what it did and what it omitted is "correct. Dismiss the petition of L. H. Stamp with costs. "Consolidate the two fiats. Let the estate under each fiat "be without prejudice to any question as to joint or separate "estate administered by the assignees under the separate fiat." It is difficult to see how this case can be reconciled with *Anonymous* (2), cited above. In *In re Farnham* (3), counsel referred to the *Anonymous* case (2) in argument, and Lindley L.J. observed: "*Ex parte Stamp* (4) seems to be an "authority the other way."

In re James (5) establishes that a lunatic can be made a bankrupt on a petition presented by the committee in the name of the lunatic, but throws no light on the question whether he can be made a bankrupt on a petition presented by a creditor and opposed by the committee or quasi-committee. The decision in *Ex parte Cahen* (6) does not deal with this question, but Bramwell L.J. observed in the course of the argument: "An execution above 50*l.* levied by seizure

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(1) De G. 346.
(2) 13 Ves. 590.
(3) [1895] 2 Ch. 799, 802.
(4) De G. 345.
(5) 12 Q. B. D. 332.
(6) 10 Ch. D. 183.

"and sale would be an act of bankruptcy, of which the other "creditors might take advantage," and he referred to the Bankruptcy Act, 1869, ss. 6 and 87. In *In re Lee* (1), a creditor took proceedings in the county court at Leeds with a view to making a lunatic (so found by inquisition) a bankrupt. The registrar refused to proceed on the petition. The committee applied to the court in lunacy for directions, and the court directed that the committee should be at liberty to consent to an adjudication in bankruptcy against the lunatic. It is, however, impossible to say what would have been the ultimate result of the bankruptcy proceedings, if the court had not given this direction, and it appears that the debt on which the bankruptcy proceedings were founded was a debt incurred by the committee, after his appointment, in carrying on the lunatic's business.

Next in order of date comes *In re Farnham* (2). We have already pointed out that in that case the question which we now have to decide was treated as being an open question. We were referred to a second case, *In re Farnham* (*No.* 2) (3). There the court declined to express any view whether the adjudication in bankruptcy could be annulled, if an application were made for that purpose. It is, however, to be noted that both Lindley L.J. (4) and Kay L.J. (5) referred to the fact that the act of bankruptcy was committed after Farnham had been found lunatic by inquisition as being a ground on which the adjudication might be annulled. These passages in the judgments may indicate a view that, if the act of bankruptcy had been committed before the inquisition, an application to annul the bankruptcy could not have succeeded. To this extent, *In re Farnham* (*No.* 2) (3) may lend some support to the view which we have formed. It appears to us that in the present state of the authorities and having regard to the observations of the Court of Appeal in *In re Farnham* (2), we are free to form our own view on the question left open in that case, and we have already stated our conclusion on that question.

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(1) 23 Ch. D. 216.
(2) [1895] 2 Ch. 799.
(3) [1896] 1 Ch. 836.
(4) [1896] 1 Ch. 840.
(5) Ibid. 843.

We must now consider whether there is any reason which should induce the court to refrain from making a receiving order in the present case. Counsel for the appellant pointed out that in the present case the official solicitor has been appointed receiver or quasi-committee and has been directed to take possession of all the real and personal property belonging to the patient (that is, the debtor). He suggested that in those circumstances, if the receiving order stands, there will be a conflict between the trustee in bankruptcy and the quasi-committee appointed in lunacy. He contends further that, if adjudication follows on a receiving order and the title of the trustee in bankruptcy relates back to January 28, 1941, the order of the court in lunacy will become nugatory, because there will be no property of the lunatic to which it can apply. He suggests that it would be extremely inconvenient if such a result were allowed to take place, since any receiver appointed by the court in lunacy could not for some time safely deal with any of the assets of the patient. He could not be sure that the patient had not committed an act of bankruptcy, before the order was made in lunacy, which might subsequently form the foundation for an adjudication in bankruptcy.

In our judgment, there is a short and simple answer to this contention. We do not doubt that, if the receiving order stands and adjudication follows, the title of the trustee in bankruptcy will relate back to January 28, 1941. In our view, however, the relation back of the trustee's title in no way affects the direction and control of the debtor's property which has already been assumed by the court in lunacy. The trustee in bankruptcy will stand in the shoes of the debtor as from January 28, 1941, but the title of the trustee to the property belonging to the debtor on January 28, 1941, is no better than the title of the debtor himself. The court in lunacy took away from the debtor and gave to the receiver appointed by it the possession and control of the debtor's property, and that possession and control cannot be ousted by the trustee in bankruptcy so long as the jurisdiction of the court in lunacy continues. If the debtor recovers his faculties and the jurisdiction of the court in lunacy comes to an end, the trustee in bankruptcy will be in a position to administer the property of the lunatic, the legal title to which is vested in him by the provisions of the bankruptcy legislation, for the benefit of the debtor's creditors.

We are not aware of any decision which completely covers this point, but we are assisted in arriving at this conclusion by certain passages in the judgments of the Lords Justices in *In re Farnham* (1). Lindley L.J. said (2): "It has been pointed "out, and I think very properly, that inasmuch as this lunatic "was adjudicated a bankrupt some time after he was found a "lunatic by inquisition, the trustee in bankruptcy must take "subject to the powers of the judge in lunacy conferred by "the Lunacy Act, 1890; and the Lunacy Act, 1890, by "ss. 117 and 120 vests in or confers upon the judge in lunacy "various powers, including a power to apply the estate of "the lunatic in discharge of his debts . . . . I think Mr. "Warmington was quite right in saying that, whatever may "be true of the actual vesting of the property in the trustee, "it does not follow that the trustee may take the property "which is so vested in him except subject to the jurisdiction "which has accrued before the bankruptcy to the judge in "lunacy under the inquisition." Lopes L.J. said (3): "But "then it must be recollected that this adjudication in "bankruptcy was after the date on which Farnham was "found to be a lunatic; and then the consideration arises "whether or not the jurisdiction of the court in lunacy does "not take effect. There is no doubt of this, I apprehend, "that, subject to what I am about to say, the property of "the bankrupt would have vested in the trustee; but the "trustee, in my judgment, took his title subject to the power "contained in s. 117 of the Lunacy Act, 1890. The title of "the trustee was acquired subsequently to the lunacy, and, "being acquired subsequently to the lunacy, in my opinion it "cannot be enforced in lunacy, in consequence of the 117th "section of the Lunacy Act, 1890; and that being so, this "plate is subject to be dealt with by the court according to

(1) [1895] 2 Ch. 799.
(2) Ibid. 807.
(3) Ibid. 809.

"its discretion." Rigby L.J. said (1): "It appears to me "that, without in the least purporting to decide that there "can be adjudication against a lunatic, and that there has "been a proper adjudication in this case—assuming that he "committed an act of bankruptcy by allowing goods of his "to remain in the hands of the sheriff, and that everything "has been done in due order—yet that adjudication cannot "in any way oust the jurisdiction of the judge in lunacy, or "interfere with any principle which has been established in "that jurisdiction." Later, he said (2): "It is quite plain "that the Act intended that the property should come to the "trustee, not as the property of the beneficiary under the "settlement, but as if the settlement never had existed; that "is to say, it passes as the property of the bankrupt, the "lunatic. That being so, I think it is perfectly plain that the "jurisdiction of the judge in lunacy over all this property "exists and cannot be ousted by an adjudication in bankruptcy, "even though properly made." We do not overlook the fact that in *In re Farnham* (3) the act of bankruptcy occurred after the lunatic had been found lunatic by inquisition and a committee appointed, so that the doctrine of "relation back" had no application in that case. We think, however, that the observations of the Lords Justices are equally applicable to a case where the act of bankruptcy had been committed before the jurisdiction of the court in lunacy arose, provided the adjudication in bankruptcy is later in date than the order in lunacy.

Apart from the fact that we see no good reason why a receiving order should not be made, there are certain advantages to be gained by taking this course. The trustee in bankruptcy will acquire the legal title at once and will be able to administer the property as soon as the jurisdiction in lunacy comes to an end. Further, it may well be that investigation by the trustee may reveal that there are assets which he can get in, but which are beyond the reach of the receiver in lunacy. For instance, there may be settlements by the debtor which are void as against the trustee in bankruptcy, and there may be payments by the debtor which can be set aside under the provisions of the bankruptcy law as constituting a fraudulent preference. We do not express any view whether any assets got in by the trustee in bankruptcy by reason of the provisions of the bankruptcy law, which did not belong to the debtor at the time when the jurisdiction of the court in lunacy arose, are or are not subject to the control of the court in lunacy. That is a question which may never arise. It is sufficient to say that in our judgment, for the reasons we have stated, the learned registrar was right in making a receiving order, and this appeal must be dismissed, with costs.

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(1) [1895] 2 Ch. 811.
(2) Ibid. 812.
(3) Ibid. 799.

Appeal dismissed.

Solicitors: *Official Solicitor; Isadore Goldman & Son.*

F. C.

In re WINSLOW HALL ESTATES COMPANY AND UNITED GLASS BOTTLE MANUFACTURERS, LIMITED'S CONTRACT.

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July 28, 29.

Emergency legislation—Vendor and purchaser—Contract for sale of land—Requisition notice—Possession not taken by government before completion—Ability of vendors to give vacant possession—Encumbrance of land by notice—Defence (General) Regulations, 1939 (*St. R. & O.* 1939, *No.* 927), *reg.* 51 (1.).

A contract for the sale of land having been entered into on December 23, 1940, notice was given on behalf of the government on January 25, 1941, to the purchasers that it was intended to requisition the land under reg. 51 (1.) of the Defence (General) Regulations, 1939. The vendors were in a position to complete on February 3, 1941. The government did not take possession of the land until after March 10, 1941. On a vendor and purchaser summons taken out by the purchasers on the last mentioned date:—

Held, that at the date of the summons the vendors were able to give vacant possession; that the giving of the requisition notice did not create an encumbrance on the land so as to prevent the vendors from performing their contract; and that the mere fact that the land was expressed to be sold subject to a previous requisitioning notice relating to part thereof, which was in force at the date of the contract, did not imply that the vendors covenanted that no other notice would be served in respect of the land.

ADJOURNED SUMMONS.

By a contract dated December 23, 1940, the Winslow Hall Estates Co., the vendors, agreed to sell to the United Glass Bottle Manufacturers, Ld., the purchasers, certain freehold premises in Buckinghamshire, comprising land and a mansion house known as Winslow Hall. By the special conditions of sale the completion of the purchase was to be on January 13, 1941, and the vendors were to sell as absolute owners. The seventh special condition provided: "The property is sold "subject to the requisitioning notice by the War Office (if still "in force) with regard to the stables and rooms over butler's "room and half garage." (This related to a billeting notice which was subsequently withdrawn.) The National Conditions of Sale (13th ed.) formed part of the contract and by condition 10: "Without prejudice to the duty of the vendor to "disclose, on or before the date of the contract, all latent "easements and other liabilities known to the vendor to affect "the property, the property is sold subject to any land tax, "tithe redemption, annuity, rights of way and water, and "other rights, easements, quasi-easements, liabilities and "public rights affecting the same, and to tenancies, whether "mentioned in the particulars of sale or not, and to the rights "and claims of tenants not attributable to breaches of obligations imposed on the landlord which occurred and ought to "have been discharged before the sale. No error, misstatement or omission in the particulars, sale plan or conditions shall annul the sale, nor (save where the error, statement or omission relates to a matter materially affecting "the description or value of the property) shall any compensation be allowed either by the vendor or purchaser in "respect thereof." Later, by agreement between the parties, January 25, 1941, was substituted for January 13, 1941, as the completion date. On January 24, 1941, a representative of the Commissioners of Works inspected the property and stated that it would be requisitioned. On January 25, 1941, a requisition notice in the following terms was served by the Office of Works on the purchasers: "Emergency "Powers (Defence) Act, 1939. Defence (General) Regulations, 1939. Dear Sirs, Address of Premises: Winslow "Hall, Winslow, Bucks, including the portion already "requisitioned. I have to inform you that the government "have come to the conclusion that it is essential, in the national "interest, to take immediate possession of the above premises "occupied by you. I must therefore ask you to take this "letter as formal notice that the Office of Works are entering "on and taking possession of the premises forthwith and also "intend to requsition such of the chattels therein as may be "required. An inventory of all chattels in the premises will "be drawn up and the items which are requisitioned will be "indicated thereon. In the meantime you are desired not to "remove any of the contents of the premises except by arrangement with this department . . . ." On January 25, 1941, the vendors were not in a position to complete because the

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conveyance had not been signed by all the necessary parties. The vendors' solicitor, in a letter dated January 31, 1941, notified the purchasers' solicitors that it had then been duly executed and in a further letter dated February 3, 1941, he stated that the house was still empty, His Majesty's Government not having then taken possession of the property. On March 10, 1941, the purchasers took out this vendor and purchaser summons under s. 49 of the Law of Property Act, 1925, seeking rescission of the contract and asking for a declaration that the vendors were unable to show a good title to the premises or to perform their part of the contract, in that they had impliedly contracted, or were estopped from denying that they had contracted, to give vacant possession and could not do so, or, alternatively, that they had impliedly contracted to convey free from any encumbrance not mentioned in the contract and were unable to do so, or that they had impliedly contracted that the land was sold and would be conveyed subject to no requisitioning notice other than that expressly mentioned in the contract. By June 10, 1941, the government had taken possession of the property.

Roxburgh K.C. and *Rawlence* for the purchasers. After the requisition notice had been served, the vendors were not in a position to give vacant possession. In the circumstances the court will not specifically enforce the contract and the land remains the property of the vendors ab initio. They referred to *Phillips* v. *Caldcleugh* (1) and *Hughes* v. *Jones* (2). Secondly, the notice created an encumbrance which prevented the vendors from performing their contract to convey free from any encumbrance not mentioned in the contract. The emergency legislation in general may be compared to a floating charge which an actual requisition notice crystalizes. Thirdly, by specifically referring to the previous requisition notice in the seventh special condition, the vendors impliedly contracted that the land was sold subject to no other such notice.

Sir Herbert Cunliffe K.C. and *Shebbeare* (for *Wigan*, on war service) for the vendors. At the time of the summons the vendors were still in a position to give vacant possession in the fullest sense of the term because His Majesty's Government had not then taken possession. They referred to *Lysaght* v. *Edwards* (1) and *Allen* v. *Inland Revenue Commissioners* (2). Any burden laid on the land between the date of the contract and that of completion, as the result of action by the state or by a local authority, falls on the purchasers. From the date of the contract the property is theirs and they must take it with all the advantages and the disadvantages: see *Paine* v. *Meller* (3) and *Robertson* v. *Skelton* (4).

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(1) (1868) L. R. 4 Q. B. 159. (2) (1861) 31 L. J. (Ch.) 83.

BENNETT J. [having stated the facts:] It is plain that on June 10, 1941, some department of His Majesty's Government was in exclusive occupation of the premises comprised in the contract of sale, and there is no doubt that possession of them had been taken under reg. 51 (1.) of the Defence (General) Regulations, 1939, made under the provisions of the Emergency Powers (Defence) Act, 1939, which is as follows: "A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land." I am not going to decide what the position of the parties would have been if possession had been taken before the date fixed for completion or before the vendors were in a position to complete, since it appears from the evidence that on February 3, 1941, the vendors were in a position to hand to the purchasers a properly executed conveyance and to give them vacant possession of the property which they had contracted to sell. On those facts the purchasers have not proved that when the summons was issued on March 10, 1941, the vendors were

(1) (1876) 2 Ch. D. 499, 506.
(2) [1914] 1 K. B. 327.
(3) (1801) 6 Ves. 349.
(4) (1849) 12 Beav. 260.

unable to give them vacant possession of the property contracted to be sold. Indeed, the vendors have proved that they were in a position to do so at that date.

The next point taken on behalf of the purchasers was that the notice served on them by the Office of Works on January 25, 1941, was an encumbrance. There is no provision in the Emergency Powers (Defence) Act, 1939, or in the Defence (General) Regulations, 1939, which makes it incumbent on the Office of Works, or any other competent authority, when exercising the powers conferred on them by reg. 51 (1.), to serve any notice of their intention to exercise those powers on persons whose property they propose to take under the provisions of the regulation. The notice is merely a polite intimation on the part of the government that they propose to act. Anybody's land in this country to-day is liable to be taken under the provisions of this regulation, and the notice does not place on the land in respect of which it is served any burden additional to that to which all land in England is subjected at the present time. In my judgment, the notice of January 25, 1941, did not create an encumbrance which prevents the vendors from performing the contract into which they entered.

The third ground on which the purchasers seek a declaration that the vendors have failed to perform their obligations under the contract is that the vendors impliedly contracted that the land would be conveyed subject to no requisitioning notice other than that expressly mentioned in the contract, namely, the notice, since withdrawn, served on behalf of the War Office and relating to the stables and the rooms over the butler's room and half the garage. The mere fact that in the contract there is reference to that notice does not seem to me to be a matter from which I can imply that the vendors contracted that no other requisitioning notice would be served in respect of the property by any other government department.

In my opinion, the purchasers are not entitled to the relief which they claim. As I have said, I am not deciding what the rights of the parties would have been if possession had actually been taken before the vendors were in a position

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to complete the contract by conveyance and the giving of vacant possession. I am only deciding the question raised on the grounds which I have indicated. Accordingly, the summons must be dismissed.

Solicitors: *Vizard, Oldham, Crowder & Cash; Heywood & Ram, for Philip Wood, Buckingham.*

F. C.

END OF VOL. AND OF CHANCERY SERIES FOR 1941.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1941, will be as follows:—

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